Tagore Law Lectures, 1884.

MAHOMMEDAN LAW

COMPILED FROM

AUTHORITIES IN THE ORIGINAL ARABIC.

VOL. I

CONTAINING THE LAW RELATING TO

GIFTS, WAKFS, WILLS, PRE-EMPTION AND BAILMENT.

BY

SYED AMEER ALI, M.A., C.I.E.,

BARRISTER AT LAW, A JUDGE OF HER MAJESTY'S HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL, AUTHOR OF "THE PERSONAL LAW OF THE MAHOMMEDANS," "THE STUDENT'S HANDBOOK OF MAHOMMEDAN LAW," "THE LIFE AND TEACHINGS OF MOHAMMED, OR THE SPIRIT OF ISLAM," "A CRITICAL EXAMINATION OF THE LIFE AND TEACHINGS OF MOHAMMED," &c &c

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PREFACE.

THE law relating to Gifts, *Wakfs* and Wills formed the subject of my Tagore Law Lectures for 1884, and, to some extent, the present work may be regarded as a reprint of those lectures, but it possesses several features of its own, which, I venture to think, entitle it to a higher position than that of a mere second edition. The Introduction has been altered and considerably amplified; the Shiah Law relating to life-grants and limited estates in general is fully discussed; the Chapters dealing with the Hanafî Law relating to *Wakfs* have been almost completely re-written with quotations from the most important authorities; those dealing with the Shiah Law of *Wakf* have been amplified; and the subject of Pre-emption and Bailment has been added. The Chapters in the old Lectures on the Hanafî Law of *Wakf* were founded chiefly on the *Radd-ul-Muhtâr* and the *Fatâwa Alamgiri*. For the present work I have consulted nearly thirty recognised standard authorities and have embodied their statements in my compilation. Additional extracts are given in the Appendix.

The law relating to *Wakfs* is to the Mahommedans of India, from every point of view, the most important branch of their legal system. Not only does it form an essential part of their religion, but the existence of their principal families is dependant upon it. I have, therefore, endeavoured in these pages, to the best of my ability, to state clearly and precisely what the Mussulman Law is.

In some places I have rendered the term "*wakf*" as trust, in others, as dedication or consecration. Ryan, C. J., in the case of *Doe dem Jaun Beebee* v. *Abdollah Barber*, used the latter expression, and M. Tornouw, in his *Droits Musulman*, has done the same. Properly analysed, it will be found that the word *wakf* combines all the ideas conveyed by these different expressions. The Mussulman Law holds that there can be no *milk* (property) without a *mâlik* (proprietor), that all property owned by human beings is God's free gift to them; and that when a man creates

a *wakf* he transfers the *milk* (the ownership in "the substance of the thing") to the Almighty, on the condition that the *usufruct* should be applied to the benefit of His creatures, whoever they may be. It will thus be seen that the word combines the elements of trust, dedication and consecration. From one point of view, God is the owner of the *substance* (*asl*), the recipients of the benefaction being His creatures; in another sense, He is the trustee on their behalf. The *mutwalli* is a mere manager; he has no power of mortgage, sale or lease over the *wakf* property, even for a necessity, save and except so far as is provided in the *wakf-namah*. His position is more analogous to that of a manager of a minor's estate than to that of a trustee in the technical sense. I mention this here in order to prevent any misapprehension.

The work has been carried through the press under great pressure of other duties, and I fear some misprints have passed unnoticed and uncorrected. For this I must ask the indulgence of the public.

☞ Attention is especially invited to the corrections noted in the *Corrigenda* for pp. 220 and 231. The mistakes arose in consequence of two or three words being mistranscribed in the MSS. copy of the *Fathul-Kadîr* lent to me by the Patna Oriental Library, which I discovered on comparing it with a printed copy placed in my hands the other day. The corrections make no difference in the sense; on the contrary, they accentuate the force of the observation I made on the strength of the passage, for it shows that a *wakf* by a Moslem in favour of his children, with a reserve for the poor, is *unquestionably* lawful.

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AMEER ALI.

MAHOMMEDAN LAW.

TABLE OF CONTENTS.

INTRODUCTION.

PAGE.

The Mahommedan Law preserved to Mahommedans in British India—Policy of the Legislature—Development of Islámic jurisprudence—Divergence between the Shiah and Sunni schools of law—Its principal cause—The *Imamate*—The basis upon which the Islamic Law is founded—*Koran*—*Sunnis*—*Ijmaá*—*Kyás*—Shiah subsections—The *Mutazalas*—Introduction of Shiah doctrines in India—The Sunni schools—The jurists—Their principal works . ... 1—28

Notes ... ... 29—31

CHAPTER I.

THE LAW RELATING TO GIFTS.

SECTION I.—Restriction on the disposing powers of a Mahommedan—The policy of the Mahommedan Law—*Rani Khujoorunnissa* v. *Musst. Roushan Jahan*—Dispositions *inter vivos*—*Hiba*—*Wakf*—*Aâriat*—Difference between *hiba* and *aâriat*—*Mohammed Faiz Ahmed Khan* v. *Ghulam Ahmed Khan.*

SECTION II.—*Hiba* or gift simple—Definitions according to the various schools—*Kamar-unnissa Bibi* v. *Hossaini Bibi*—Capacity to make a *hiba* Minority Causes of inhibition—*Tacoordeen Tewary* v. *Nawab Syed Ali Hussain Khan*—*Marz-ul-Mout* Its meaning *Jámaa ush-Shittát* and the *Sharáya Alamgiri* and the *Radd*—*Labbi Bibi* v. *Bibiun Bibi*—*Ghulam Mustafa* v. *Hurmut.*

SECTION III.—The donee—The subject-matter of the gift—*Mullick Abdul Ghuffoor* v. *Musst. Muleka*—Gift of property in the occupation of tenants—Hypothecation—*Mohin-uddin* v. *Manchar Shah*—Gift of a debt—What may or may not form the subject of a *hiba*—*Mushâa*—Its *raison d'être*—Divergence between the schools—Impartible *mushâa*—Possession validates gift of partible *mushâa* under the Hanafi Law—Gifts of things occupying and occupied—A gift rendered void by a right being established in part of it—Gift by one partner to another of a share in the profits not unlawful—*Kabz-ul-Kámil* or complete possession—Possession perfects an *invalid* gift—Authority to take possession—Its effect—Doctrine of *mushâa* not applicable to zemindaris—*Abadoonissa* v. *Ameeroonnissa*—*Jaffar Khan* v. *Hubshi Bibi*—*Jewan Buksh* v. *Imtiaz Begum*—*Kasim Hussain* v. *Sharifunnissa*—Gift by one person to two donees—*Nizam-ud-din* v. *Zabida Bibi*—Cases discussed—Gift to an infant and an adult jointly—The doctrine of *tahlil.*

SECTION IV. Shiah doctrines—Gift of *mushâa* valid—Discharge or release—Gift of a debt to a person other than the debtor . . 32—92

CHAPTER II.

FORMALITIES RELATIVE TO GIFTS.

SECTION I.—Conditions necessary to the validity of a gift—Seisin—*Nanda Sing* v. *Meer Jafer Shah*—Ability to take possession is sufficient in many cases to validate the act of donation—*Amina Bibi* v. *Khatija Bibi and others.*

PAGE.

SECTION II.—Gifts to minors—Presents to children—Cases discussed.

SECTION III.—Gifts with conditions—Limited estates under the Shiah Law—*Nasir Hossain* v. *Sughra Begum.*

SECTION IV.—Conditional gifts 93—117

CHAPTER III.

THE REVOCATION OF GIFTS.

SECTION I.—Revocation—Shâfei and Mâliki Law—Hanafi Law—Circumstances under which a gift is not revocable—Marital relationship bars revocation— *Sadakah* not revocable, its *raison d'être* 118—126

CHAPTER IV.

CONSIDERATION OR *EWAZ.*

SECTION I.—Its meaning and effect—*Hiba-bil-Ewaz*—Not revocable—*Hiba-ba-shart ul-ewaz*—The effect of a *shart* (condition) attached to a gift—Distinction between a conditional gift and a gift with a condition.

SECTION II.—Gift of a debt—Contingent gift of a debt.

SECTION III.—Gifts by parents to their children—Gift by a wife of her dower—Life grants or *Umras* ... ... 127—138

CHAPTER V.

THE SHIAH LAW RELATING TO GIFTS.

SECTION I.—Limited estates—Powers of life tenants—Where delivery of possession not necessary—Gift of *mushâa* . . . 139—148

SECTION II.—Gift of a debt.

CHAPTER VI.

THE LAW OF GIFT ACCORDING TO THE SHAFEI DOCTRINES 149—151

CHAPTER VII.

THE HANAFI LAW OF *WAKF.*

SECTION I.—The doctrine of *Wakf*—its signification—The views of Abû Hanifa and of the Disciples. . .

SECTION II.—Conditions relating to the *wâkif* or settlor—*Delroos Banoo Begum* v. *Nawab Asghur Ally*—*Fatima Bibi* v. *the Advocate-General*—The principles derivable from this decision—Subject matter must be the property of the *wâkif*—*Wakf* of property subject to a lease or mortgage—*Wakf* created by an insolvent person—*Wakf* by a *Marîz*—Testamentary *wakf* revocable.

SECTION III.—*Sadakah*—Its meaning.

SECTION IV.—How a *wakf* may be constituted—*Jewan Dass Sahoo* v. *Shah Kubeerooddeen* and other cases discussed—The word *wakf* sufficient by itself.

SECTION V.—The conditions necessary to the constitution of a *wakf*—Declaration Perpetuity a necessary condition, but its mention not necessary—Delivery of possession not necessary—*Doe dem Jaun Beebee* v. *Abdollah Barber*—The subject of the *wakf* must be certain—Examples of a contingent *wakf.*

SECTION VI.—The subject-matter of *wakf*—The conditions relating to the subject-matter of *wakf* ... . 152—215

CHAPTER VIII.

THE *MOUKOOF ALAIHIM* OR THE OBJECTS OF *WAKF.*

SECTION I.—General observations—Law and religion—Synonymous terms.

SECTION II—Classification of *wakfs*—In whose favor a *wakf* may be made—Ultimate reversion—*Wakf* on one's self—*Wakf* on posterity—Valid without difference *Rasamaya Dhur Chowdhury* v. *Abul Futa Mohammed Ishak* and other cases discussed. 215—264

PAGE.

CHAPTER IX.

THE OBJECTS OF *WAKF*—(*continued.*)

SECTION I.—*Wakf* on one's children and descendants—In general terms—When three generations mentioned — Poor excluded until the extinction of the *wâkif's* descendants—Rules of distribution—Preference to propinquity—Distribution *per stirpes*—*Wakf* for lineal descendants how applied—Reservation of a right of survivorship—A *wakf* in favour of the *wâkif's progeny* valid—A *wakf* in favour of the infant children of *wâkif*—A *wakf* for the indigent to be applied first to the *wâkif's* children and relation.

SECTION II.—*Wakf* in favour of the kindred—Explanation of the term—Mode of application—Test of indigence—Meaning of the term orphan—Age of majority—*Wakf* in favour of neighbours.

SECTION III.—Principles of construction—Appropriation for a class of persons—When rejected goes to the poor—Division of produce among the recipients—Application of a *wakf* in favour of the indigent—Beginning must be with the *wâkif's* descendants—Testamentary *wakf* 301

CHAPTER X.

THE OBJECTS OF *WAKF*—(*continued.*)

SECTION I.—General observations—Different kinds of *wakf* in which the affluent and the indigent are equally interested.

SECTION II.—Mosques and Musallas—How dedicated—Mosque does not belong to any particular sect—The Aamil-bil-Hadis—Colleges, Schools, etc., stand on the same footing as mosques—When the mosque is ruined how applied.

SECTION III.—Dedications to aqueducts, inns, &c.

SECTION IV.—Principles applicable to cases where the primary or intermediate objects have failed . . ...

SECTION V.—The income of the *wakf* estate how to be applied—Disbursement from the *wakf* property how to be made—Kâzi's discretion 302—330

CHAPTER XI.

GENERAL PRINCIPLES.

SECTION I.—The powers of the *wâkif*—Condition of exchange lawful—Its meaning—Conditions laid down by the *wâkif* are equivalent to the commands of the Law-giver—Conditions which may be varied.

SECTION II.—The powers of the *wâkif* and conditions of *wakf*—A contingent or suspensive *wakf* invalid—Kâzi may authorise sale when advantageous for the *wakf* 331—345

CHAPTER XII.

THE GOVERNANCE OF THE *WAKF*.

SECTION I.—The *mutwalli*—Power of appointing *mutwalli* rests primarily with the *wâkif*—Women eligible for the *towliat*—Certain exceptions—The appointment of a minor.

SECTION II.—The appointment of the *mutwalli*—*Advocate-General* v. *Fatima Begum*—The right of the members of the *wâkif's* family to the office of *towliat*—When a *mutwalli* may appoint another in his place—Meaning of the term "general"—Conditions made by the *wâkif* for the *towliat*—The dismissal of the *mutwalli*—The responsibility of the *mutwalli*—No recipient can assign his allowance—Debts contracted by the *mutwalli*.

SECTION III.—The lease of *wakf* property—Kâzi's discretion . ... 346—382

CHAPTER XIII.

ALIENATION OF *WAKF* PROPERTY.

Wakf property absolutely inalienable—Cases discussed—*Moulvee Abdullah* v. *Rajeeri Dosea*—Necessity no ground for alienation—A *wakf* created with a knowledge of its effect absolutely binding ... 383—389

PAGE.

CHAPTER XIV.

THE SHIAH LAW OF *WAKF*.

SECTION I.—General observations—*Phudla Bibi* v. *Mohammed Kazem Isphahani*—The definition of *wakf* according to the *Sharâya-ul-Islâm*—Transmutation of possession necessary; subject to qualifications—A *wakf* made in death-illness.

SECTION II.—The conditions relating to the subject of *wakf*—The conditions relating to the *wâkif* or appropriator—The conditions relating to the *moukoof alaihim*—A *wakf* for *masâlih* valid—A *wakf* in favour of a *harbi* invalid—A *wakf* for sinful purposes invalid—A *wakf* in favour of Moslems generally—A *wakf* in favour of neighbours—A *wakf* in favour of a *maslahat* that has ceased to exist, how to be applied—Ibn Junaid's views—A *wakf* for an indeterminate object invalid—A *wakf* in favour of relations generally.

SECTION III.—The conditions upon which depends the legality of a *wakf*—Essentials requisite to the legality of a *wakf*—*Wakf* is favour of descendants and on their failure for the poor valid by consensus.

SECTION IV.—The divestment of the *wâkif's* interest—Seisin under the Shiah Law—A *wakf* in favour of one's self not valid under the Shiah Law—A *wakf* in favour of one's self and the poor—A *wakf* in favour of children valid—A *Sadakah* cannot be revoked 390 421

CHAPTER XV.

THE MALIKI LAW RELATING TO *WAKF*.

SECTION I.—The *wâkif's* capacity—The beneficiary—The *wâkif's* powers—The rules relating to the devolution of *wakfs*—For children and kindred.

SECTION II.—What may be constituted *wakf*—*Wakf* of *mushâa* valid—The formalities relative to the creating of a *wakf*—When possession should be taken—Temporary *wakf* lawful.

SECTION III.—The legal effect of a *wakf* 422–434

CHAPTER XVI.

THE LAW OF *WAKF* ACCORDING TO THE SHAFEI SCHOOL . 435–439

CHAPTER XVII.

THE RULES OF PROCEDURE.

Principles of procedure under the Mahommedan Law—Cases discussed . 440–456

CHAPTER XVIII.

THE LAW RELATING TO WILLS.

SECTION I.—Preliminary discourse.

SECTION II.—The form and characteristics of a will or *wasiat*—A contingent *wasiat*.

SECTION III.—The capacity of testators—*Marz-ul-mout* (Hanafi doctrines)—The Shiah doctrines—The capacity of an infant—Shâfei and Maliki doctrines—Bequest to a slayer invalid—Bequest to an heir valid with consent of the other heirs 457 483

CHAPTER XIX.

THE CONSTITUTION OF A *WASIAT*.

SECTION I.—Who may be legatees or devisees—A *wakf* for the poor (Shiah Law)—Abû Yusuf's views—The Shiah doctrines—Bequest in favour of the kindred (Shiah doctrines).

SECTION II.—General rules of interpretation—(Hanafi doctrines)—Bequest to a neighbour—The Hanafi Law—The Shiah Law—The acknowledgment of a debt (Hanafi Law) 484–511

CHAPTER XX.

Rules relating to wills by non-Moslems 512–517

PAGE.

CHAPTER XXI.

WHAT MAY BE DEVISED.

Shiah Law—Hanafi Law—When two legacies left to the same person—Maliki doctrines—Hanafi Law—Legacies to several objects how effect should be given to them 518-526

CHAPTER XXII.

GENERAL PRINCIPLES.

SECTION I.—The legal effect of a *wasiat*—*Wasiat* defined—Ambiguous legacies how construed under the Shiah Law.

SECTION II.—The revocation of wills—The different modes of revocation—Hanafi and Shiah doctrines—The acceptance of a legacy.

SECTION III.—The *wasiat* of usufruct of lands, gardens, houses, trees, &c. —Rules relating to annuities ... . 527—543

CHAPTER XXIII.

EXECUTORS.

SECTION I.—Who may be appointed as executors—A minor executor—Joint executors, one of whom is a minor—An alien non-Moslem cannot be appointed—*Mohammed Amin-uddin* v. *Mohammed Kabir-uddin*—*Henry Imlach* v. *Musst. Zuhur-un-nissa Khanum.*

SECTION II.—Appointment of executors, how made—The different kinds of executors—When two executors, one cannot act singly except in certain matters—*Ghibat-i-Munkataa*—Executors for a special purpose —Derivative executors—Sunni and Shiah doctrines.

SECTION III.—The powers of the executor—A *wasi* appointed by the father—Difference between his powers and those of one appointed by any other relative—Power of sale possessed by the *wasi*—Restrictions thereon—Rules laid down in the *Radd ul-Muhtár*—The difference between the powers of a *wasi* appointed by the father and a *wasi* appointed by the Kâzi—The *wasi* cannot trade with the goods of the infant on his own account—The executor liable for waste or neglect—Limited executorship—Sunni and Shiah doctrines . . 544 578

CHAPTER XXIV.

SHAFEI DOCTRINES ... . 579—588

CHAPTER XXV.

THE LAW OF PRE-EMPTION.

SECTION I.—General Observations . . . . . .

SECTION II.—Persons entitled to pre-empt . ...

SECTION III.—Formalities necessary to establish the right of pre-emption

SECTION IV.—The proceeding in Court ... . 589—605

CHAPTER XXVI.

THE SHIAH LAW OF PRE EMPTION ... . 606—611

CHAPTER XXVII.

THE LAW OF BAILMENT ... ... 612—616

APPENDIX.

Shiah Law of *Wakf* . . , ... 617—620

Hanafi Law of *Wakf* . . .. 620—661

TABLE OF CASES CITED.

A.

PAGE.

Abadi Begum *v.* Imami Begum 598, 604
Abdul Ganne Kásam *v.* Hussen Miya Rahimtullah... 217, 241, 252, 253, 254
Abdul Azim *v.* Khundar Hamid Ali 596
Abdul Hasan *v.* Haji Mohammed Masih Karbalai 87, 377, 383
Abdur Rahman *v.* Yar Mahommed 452
Advocate-General ex-relatione Dayá Muhammad *v.* Muhammad Husen Huseni 29
Advocate-General *v.* Fatima Sultani Begum ... 296, 347, 352, 353
Aga Mahommed Kumul Tehranee *v.* Aga Abbas Tehranee 452
Agha Mahomed Yusoof Mushadee *v.* Abdool Hossain Khan 353
Ali Mohammed *v.* Taj Mohammed 598
Amina Bibi *v.* Khatija Bibi 97
Amir Ally *v.* Pearson 589
Amirunnissa *v.* Abedunnissa 64, 69
Amrutlall Kalidas *v.* Shaik Hussein 241, 254
Azimunissa Begum *v.* Clement Dale 3, 48, 100

B.

Banks *v.* Goodfellow 463
Bechu Lal *v.* Oliullah 452
Bhairon Sin *v.* Lalmon 604
Bibee Kumez Fatima *v.* Bibee Saheba Jan 384
Bishen Chand Basawat *v.* Syed Nadir Hossein 385
Buksha Ali *v.* Tofas Ali 391
Buzlur Rahim *v.* Shamsunnissa 4, 124, 137

C.

Cazee Ali *v.* Musutullah 604
Chand Khan *v.* Niamut Khan 593
Chekkom Rutu *v.* Ahmud 107
Chowdhry Joogul Kishore Singh *v.* Poocha Singh 596
Chunder Madhub Doss *v.* Ameer Ali and others 49

D.

Dalrymple *v.* Khoondkar Azeezul Islam... ... ... 377, 385
Dami *v.* Ashasha Bibi 606
Delroos Banoo Begum *v.* Nawab Syed Asghur Ally Khan ... 157, 159, 442

PAGE.

DeMontmorency *v.* Devereux 45
Doe dem Jaun Beebee and another *v.* Abdollah Barber, 16, 195, 229, 241, 252, 346, 347, 377
Dorab Ally Khan *v.* Suliman Kadr 59
Doyal Chand Mullick *v.* Syud Keramut Ali 347, 386
Dundas *v.* Dutens 49
Durga Persad *v.* Mami 604

E.

Ejnash Koer *v.* Amjad Ali 596
Emma Bai and others *v.* Hajira Bai 100
Eusuf Ali *v.* The Collector of Tipperah 107

F.

Fakir Rawat *v.* Emam Bukhsh 598
Fatima Bibee *v.* The Advocate-General 3, 159, 241, 263
Fatima Bibi *v.* Ariff Ishmailjee Bham 207, 252
Fida Ali *v.* Mozuffer Ali 590
Futtoo Bibi *v.* Bhurrut Lall Bhukut 385

G.

Gangabai *v.* Thavar Mulla 3
Gholam Ali Khan *v.* Ayaijut Roy 593
Ghulam Mustafa *v.* Harmut... 57
Gordhun Das Girdhurbhai *v.* Darankar 598
Gosain *v* Gosain 3
Gunga Narain Sircar *v.* Brindabun Chunder Kur Chowdhry 384
Gurdial Misser *v.* Teknarain Singh 592
Gureeballah Khan *v.* Kubul Lall Mitter 593

H.

Habibunnissa *v.* Barkat Ali 603
Haji Kalb Hossain *v.* Musst. Mehrun Bibi 407, 415
Harihar Dub *v.* Sheo Proshad... 598
Harjas *v.* Kanhya 590
Hedaitoonnissa *v.* Syud Afzul Hossain and others 325, 363
Henry Imlach and others *v.* Mussamut Zuhurunnissa Khatun... ... 546
Het Koonwar *v.* Chutterdharee Singh 546
Hirbai *v.* Garbai 12
Holloway *v.* Millard 50
Holmes *v.* Penny 49
Hussaini Bibi *v.* Hussan Sharif 347

J.

Jadu Singh *v.* Rajkumar 598
Jaffer Khan *v.* Hubshee Bibee 77, 99, 101
Jan Ali *v.* Ram Nauth Mundul 442, 445, 447, 449
Jaridan *v.* Latif Hossain 598
Jawahra *v.* Akbur Hossain 449

PAGE

Jehangir Bukhsh *v.* Lalla Bhikari Lall 596
Jewan Buksh *v* Imtiaz Begum 78
Jewan Dass Sahoo *v.* Shah Kubeerooddeen 178, 255, 383,
Joy Kaor *v.* Saroop Narain Thakoor 589
Juddo Nundan Burral *v.* Kalee Kumar Ghose 384
Juggutmoni Chowdhrain *v.* Ramjani Bibi 263

K.

Kallidas Mullick *v.* Kanhyalal Pundit 101
Kumar Kadr *v.* Bibi Luddun 147
Kamarunnissa Bibi *v.* Hussain Bibi 40, 46
Kaniz Fatima *v.* Bibi Sahebjan 442
Karim Bukhsh *v.* Kumurruddin Ahmed 595
Kasim Hussain and another *v.* Sharifunnissa 79
Kekewich *v.* Manning 85
Kent *v.* Reilly 50
Khatija Bibi, *In re* 106
Kudrutullah *v.* Mohani Mohun Shaha 596
Kulb Ali Hossein *v.* Syf Ali 383

L.

Labbi Bibee *v.* Bibbun Bibee 56, 163
Luchmipat Singh *v.* Shah Amir Alum 258
Lush *v.* Wilkinson 42
Lutifunnissa Bibi *v.* Nazirun Bibi 443
Lutufunnissa *v.* Rajaoor Kahman 51

M.

Mahin Bibi, *In re* 106
Mahomed Ahsanulla Chowdhry *v.* Amirchund Kundu ... 242, 245
Mahomed Faiz Ahmed Khan *v* Gulam Ahmed Khan 34
Mahomed Hamidulla Khan *v.* Budrunnissa Khatun 183, 253
Mahomed Hamidulla Khan *v* Lutful Huq 241, 249
Martyn *v.* Maonamara 49
Mazhar Ali *v.* Budh Singh 2
Meer Abdul Kureem *v* Musst Fuckrunnissa Begum 78
Mirza Kasim Ali *v.* Mirza Mohammed Hassan 89
Mogul Shah *v.* Mohammed Saheb 117
Mohamed Hassan *v.* Mohsin Ali 596
Mohammed Buksh Khan . Hossaini Bibi 61, 81
Mohammed Kesori *v.* Mohammed Shah Kiyamuddin 353
Mohammed Sadik *v.* Mohammed Ali and others 154, 217, 353
Moharaj Singh *v.* Lalla Beechuk Lall 595
Mohesh Lall *v.* Christian 589
Mohinudin *v* Manchershah 61, 62
Mohur Bibee *v.* Juggurnath Chowdhry 590
Morice *v.* The Bishop of Durham 325, 391
Moulvee Abdoolla *v* M S. Rajcsri Dassea and others ... 384, 386

PAGE.

Moulvee Abdoolla *v.* Ramzu Dye 383
Muhammed Gulshare Khan *v.* Mariam Begum 56
Mullick Abdul Guffoor *v.* Musst. Maleka 59, 62
Musleah *v.* Musleah 2
M. S. Banoo Bibi *v* Fakhrooddeen Hassan 105
M. S. Hyati Khanum *v.* M S. Koolsum Khanum 195, 347
M. S. Khanum Jaun *v.* M. S. Jaun Bibee 78
M. S Quadira *v.* Shah Kubeerooddeen Ahmed 178, 383
Muzhurool Huq *v.* Puhraj Ditarey Mohaputtar 248, 386

N

Nasir Husain *v.* Sughra Begum 121
Nawab Amjad Ali Khan *v.* Mohamdi Begum ... 59, 79, 124, 140, 460
Nizamuddin *v.* Zabida Bibi 81
Nizamuddin Gulam and others *v.* Abdul Gafur and others 255
Nunda Singh *v.* Meer Jaffer Shah 40, 95
Nundo Pershad Thakur *v.* Gopal Thakur 599

O.

Ojheeonissa *v.* Rustam Ali 591, 598

P

Parsons *v.* Lance 461
Pathukutu *v* Anathalakutu 236
Peake *v* Robinson 140
Peet Koonwar *v.* Chutterdharee Singh 35
Penhall *v.* Elwin 50
Pershadi Lall *v.* Irshad Ali 590
Phate Saheo Bibi *v.* Damodar Premji 353, 452
Phudia Bibi *v.* Haji Mohammed Kazem Isphahani 391
Piran *v* Abdul Karim 175, 348
Prince Suleman Kadir *v.* Dorab Ali Khan 140
Prokas Singh *v.* Jageswar Singh 598

R.

Ramdular Misser *v* Jhumak Lall Misser 598
Ram Golam Singh *v.* Nursing Sahoy 590
Ramtonoo Mookerjea *v.* Bibi Jeenut 48, 49
Rani Khujoorunnissa *v.* M S. Roushan Jehan 33
Rassamaya Dhur Chowdhry *v.* Abul Fata Mohammed Ishak 236
Roushan Jahan *v* Ennet Hassan 107
Roushan Koer *v.* Ram Dial Roy 604

S

Sahiba Begum *v* Atchamaun and others 77
Shardhari Lall *v.* Lopoo Modi 604
Shah Gulam Rahmutulia Sahib *v.* Mohammed Akber Sahib 353
Shah Mohinuddin Ahmed *v* Elahee Buksh 358
Shaik Ibrahim *v.* Shaik Suliman 101

PAGE.

Shaik Mohamad Mumtaz Ahmad *v.* Zubaida Jan 77, 81
Shaikh Kasimodin *v* Nawab Mir Sayad Alum Khan 294
Shivji Hassan *v.* Datu Mavji Khoja 12
Shoojat Ali *v.* Zumeerooddeen 377
Shurbo Narain Singh *v.* Ally Buksh Shah 377
Sinclair *v.* Home 461
Skarf *v.* Soulby 49
Soondar Koer *v.* Lalla Rughoobor Dyal 591
Syud Asheeruddeen *alias* Kalla Meah *v.* Sreemutty Drobo Moyee ... 383
Syud Shah Basit Ali *v.* Syud Shah Imamuddin 78

T.

Tacoordeen Tewary *v* Nawab Syed Ali Hussain Khan 48
Tagore *v.* Tagore 140
Thompson *v.* Webster 49
Tumeez Begum *v.* Furihut Hassan 459

U.

Ukhoy Ram Shahaji *v.* Ram Kant Row 596

V.

Vilayet Hussain *v.* Maniram 102

W.

Wahid Ali *v.* Ashraf Hossain 358
Wasik Ali Khan *v.* Government 423
Wajit Ali *v.* Abdool Ali 85
White *v.* Witt 50

Y.

Yusuf Ali *v.* Collector of Tipperah 2

Z.

Zafaryab Ali *v.* Bakhtawar Singh 444, 447
Zahar Ali *v.* Nur Ali 595
Zohorooddeen Sirdar *v.* Baharoollah Sircar 2

INDEX

TO

TECHNICAL WORDS AND PHRASES EXPLAINED IN THE TEXT.

	PAGE.
Adil	548
Aala	194
Aamal-bil-Hadis	312
Aâriat	34, 257, 612
Abad	100, 537
Abadato	617
Afzal	631
Aghnia	302
Ajr-ul-misl	631
Ahâdis	9
Ahâdîs-i-mash-hûra	9
Ahâdis i-mutwâttirèh	9
Ahl	*note*, 298
Ahl-i-bait	10, 212, 269, 355, 491
Ahl-i-masjid	365
Ahl-i-mâhalla	308, 317, 572
Ahl-i-Sunnat wa Jamâat	7
Ahl-ul-hadîs	23
Ahl-ul-Itizâl	11
Ahl-ul-rai wa'l Kiyas	23
Ahl-ul-wakf	357
Ain	145
Akab	111, 140, 269
Akâr	389, 561, 570
Akab	298
Akd	40, 41
Akd jâiz	531
Akhbâri	12, 26
Akhbâr i-wâhid	9
Akil	42
Akl	350
Akrab	491
Akribâ	281, *note*, 298, 494, 585
Al	269
Alaa sabil-attaamim	632
Al-atia	141
Al-kitâb	17
Al umra	109
Amân	485
Amânut	120
Amin	548
Amin-bil-jahr	312
An-nâhila	141
Ansâb	269
Arhâm	269, 280, *note*, 298
Ar-rukba	109
Asâbâh	434
As'hâr	494
Ashirat	636
As-hurah	491
As-sukna	109
Asl	152
Astâna	303
Atia	141
Aûs	641
Awl	291
Awlâd	141, 231, 265
Awlad-ul-awlâd	268
Ayâl	298
Azân	306, 311
Bafurzundan	*note*, 273
Bai i-fâsid	60
Bai mukasa	42, 137
Bait	297
Bait-ul-mâl	10, 214, 321, 519
Bait-ul-mukaddas	489
Bâtil	74, 86, 552
Bâligh	400
Bani	493
Bani Adam	404
Bani Tamîn	404
Batinias	10
Batn	267
Batn-baad-batn	265, 273, 411
Bi'l-ijmaâ	*note*, 571
Bil-jamâet	305
Birr	154, 216, 406
Bulûgh	350
Bukhshnâ	141
Dâr	305
Darâhim	205
Dar-ul-Haib	219
Dar-ul-Islam	219
Dârgâh	303
Dayn	399
Dêna	141
Dinars and dirhems	207, 520
Dirhems	202
Ewaz	127
Fakat	38
Fakih	54
Fakir	285, *note*, 298

	PAGE.
Farâiz	*note*, 525
Farz	524
Farzandân	141, 264
Farzandân nasl	267
Fâsid	86, 114, 548
Fâsik	549
Farzand	*note*, 271
Fatwa	15, 20
Fi-sabil-illah	193
Fukarâ	285, *note*, 298, 302
Fyl	9
Ghair-mahram	*note*, 125, 378, 380
Ghair-mukallidin	312
Ghair-mukammull	86
Ghallat	534
Ghani	285
Ghâsib	60, 380, 453
Ghâzi	304
Ghibat	10
Ghibat-i munkata	*note*, 553, 558
Ghubn-i-yasir	561
Gur-i-ghariban	*note*, 302
Habasto	176, 617
Hadis	9
Hadis Kudsi	8
Hajj	405, 527
Hakim-ush-sharâa	401
Hammam	212
Harâm	530
Haramto	176, 390, 617
Harbi	219, 247, 485
Hasham	298
Hashimis	404
Hawa	310
Hawâlât	135
Hiba	34
Hiba-ba-shart-ul-ewaz	128, 131, 591
Hiba-bil-ewaz	38, 128, 130
Hiba-bil-mushaâ	74
Hiba-i-fâsid	74
Hibanamah	36
Houz	214
Hubs	109
Huriyet	45
Ibâdut	217, 390
Ibrâ	67, 145
Idgâhs	303
Ihsân	191, 216
Ijara	*note*, 60, 612
Ijmâa	23, 25, 342, 397
Ijmaa-i Ummat	9, 258
Ijtihâd	24 *note*, 25, 525
Ikâmat	306
Ikrâh	45, 157
Ikrâr	478
Iktaât	214
Illa	290
Imâm	306, 311
Imâmate	5, 310
Imâmbara	203
Imâmias	10
Injil	403
Inshâ-allah	290
Iskât	58
Ismailias	10
Istehsân	59, 208, 342
Istisna	290
Jahaz	105
Jahmi	310
Jamâat	5, 306, 311, 637
Jâmaa-musjid	451
Jar-i-mulâsik	594
Jarudiyahs	
Jehâd	181, 191
Jihat-i-aâmma	413
Jins	269
Jins-i-karib	314
Jirân	404, 491
Junûn	42
Juzz	527
Kaaba	620
Kabûliat	38
Kabz-ul Kamil	73
Kâfila	553
Kâim-mukâm	548, 550
Kalam	552
Kâmil	75
Kandil	398
Karâbat	282, *note*, 298
Karâbatdar	269, 280, *note*, 298
Karib	283, *note*, 287
Kawl	9, 305
Khâir	154, 191, 216
Khalaf	269
Khalifa	349
Khân	263
Khânkâh	*note*, 179, 302, 303
Khirâj	375, 564
Kitabi	546
Kowm	291
Kufe	311
Kurbat	140, 216
Kurr	466
Kiyâs	9, 12, 13, 121, 208
Kyyim (used separately)	370, 409
La-ejaalo	357
Latik	106
Lungar-Khâneh	*note*, 302
Maalum	617
Madrassa	302
Mahallah	288, 289
Mahboosa	176
Mahjûr	164
Mahram	378
Maiza	318
Majhûl	136
Majlis	87
Malikana rights	59
Mâl	87
Makbara	317
Maktabs	302
Mardudah	643
Mariz	160, 275
Marz-ul maut	34, 53
Maslahat	395
Masâlih	402
Masâlih-i-aâmma	153
Mashâikh	180, 365
Mash-had	303
Mashâhid	620
Masjid	303
Masjid-i-Jâmaa	153
Maslahat	335, 395, 409, 419
Maslahat-ul-wakf	335
Mata	563
Mazâhib-i arbaa	22

	PAGE.
Maârib	72
Mazhab	139
Mâzoon	462
Mihrâb	318
Milk	140
Miskin	*note*, 298
Mokâtib	288, 462
Momins	403
Moojood	401
Moukoofa	176, 182
Moukoofa-sadakah	193
Moukoof-alaihi	182, 222, 404
Mouhoob	40
Mouhoob-alaih	40
Mowla	486
Muddot	147
Muddabars	262, 288
Muezzin	306
Muhâbât	*note*, 464
Muharamma	176
Mufti	15
Mujtahids	10
Mujtahid Imâms	13
Mukarrar	549
Munâfaa	93
Munkata-ul-awwal	323
Munkata-ul wasat	323
Mun yunsibo	294
Murâhik	471
Murid	348
Mursias	484
Mursulla	
Murtahin	60
Musâffir-khâneh	302, 417
Musâ-ilehi	*note*, 544, 548
Musalla	302, 303, 304
Musâlik	595
Mushaâ	37, 69, 185
Mushâriket	219
Mushhabbaha	310
Mushghûl	72
Mussajjil	623
Mustahakiu	636
Mustâjir	60
Mutaa	147
Mûtakaddamîn	399
Mutazalaism	11
Mutwalli (used separately)	370
Muyyin	401
Muzârib	72
Muzâribat	72, 205, *note*, 537
Muzâribat	205
Nafliat	524
Naib	553
Namâz-gahs	303
Nasab	275, 282, 491
Nashîn	348
Nasl	230, 231, 235, 269
Nass	344, 411, 635
Nawâfil	*note*, 525
Nâzir (used separately)	370
Nâzir i Awkâf	440
Niat	172
Nifas	54
Nusûs	23
Parwarish	81
Pir	348
Rafaa-eddain	311
Rafizi	310
Rah-i-khudâ	177
Rahn	132, 612
Ram	623
Rouzahs	302
Rubât	302, 304
Rukba	108
Rushd	569
Sabalto	176, 617
Sabi	470, 471
Sabil	177, 652
Sabil-illah	177, 488
Sadakah	40, 116, 149, 351
Sadakah-moukoofa	191, 227
Sadakah-munfaza	*note*, 202
Sadakah-i-fitr	*note*, 525
Saddakto	394
Saghîr	41, 279
Sahâm	527
Sahih	401
Sajjâda	348
Sajjada-nashin	348
Salat-bil-jamaât	383
Saleh	281, 365
Salwat-bil-jamaat	305
Sanad	223
Sanad-i-wakf	330
Sawâb	181
Salâhat	
Shafi-i-khâlit	593
Shafi-i-sharik	593
Shafi-jar	593, 594
Shaghil	72
Shai	527
Sharaa	258
Sharik	*note*, 592
Sherbet	483
Shiah	7, *note*, 403
Shufa	597, 598
Shuyûu	86, 87
Sijda	303
Sijl	
Sikk	388
Silsilla	348
Sium	349
Sufi	348
Sukna	615
Summa	272
Sunnat	9, 25
Suyûrghul grants	59
Taasib	39
Tâbid	192
Taburru	85
Tafsir	37
Tahlil	87
Talab-i-khusûmat	600
Talab-i-ishtish-had	595, 599
Talab-i-mowasibat	597, 599
Talab i-takrir wa-ish-hâd	597, 599
Talab-i-tamlik	600
Takbir	311
Takia	303
Taklid	312
Takrir	9
Taksimnamah	50
Taksimnamah-bil-wasiat	480, 481
Tâlibis	404
Tamlik	58, 188, 262, 527
Tamliknamah	50
Tarikat	349
Teja	349

	Page.
Tourât	403
Towliat	347
Tudbîr	*note*, 525
Tassurufât i shariyèh	41
Tussudukto	390
Ullama	401
Ummahât-ul-awlâd	262
Umm ul-walad	262, 334
Umra	108
Umra Sukua	615
Umra	405
Urf	67, 109
Usûl	13, 22
Usûli	12
Uzzha	523
Wadiat	612
Wahabto	36
Wâhib	40
Waghaira	*note*, 154
Wâjib	*note*, 525
Wâjibât	*note*, 525
Wajjah-abdî	175
Wakafa	154
Wakafto	176, 390, 617
Wakf	34
Wakf-bil wasiat	171, 487
Wakf-munkata-ul-awwal	323
Wakf-munkata-ul-wasut	323
Wâkif	154
Wakîl	
Walad	268
Walad-ul-walad	268
Wali	
Wâ-mundigân	110, *note*, 111
Wârid-sadir	247
Wasf	58
Wasi	*note*, 544, 548, 502
Wasi-bin-nikah	453
Wasi tamm	553
Wasiat	170, *note*, 459, 531
Wasiat-fi-sabil illah	490
Wasiatnamah	*note*, 459
Waw	272
Wazifa	368
Wazifadar	368
Wilâdat	638
Wilâyèt	346, 350
Wujjuh-ul-birr wa'l ishan	488, 490
Wujjuh-ul-Khair	216, 488, 490
Wuzû	319
Yeteem	286
Zahiris	23
Zaidias	10
Zakât	285, *note*, 524, 527
Zakât-ul-fitr	523
Zât-ul-imsâl	599
Zât-ul-ayn	599
Zavi	*note*, 298
Zav'il-ansâb	281
Zav'il-arhâm	281
Zav'il-karâbat	280, 281
Zayat	
Zihâr	522
Zimmi	311
Zirnas	494
Zu-karâbut	280, 491
Zurriut	271, 294

CORRIGENDA.

Page 3, line 7, *for* 'recognized' *read* 'recognised.'
,, 16, ,, 4, *for* '*Hanafi*' *read* 'Hanafi.'
,, 16, ,, 8, *for* '*Dos dem Jaun Bibee and another* vs. *Abdullah Barber*' *read* '*Dos dem Jaun Beebee* vs. *Abdollah Barber.*'
,, 16, last line, *for* '*Fatâwa-i-Kâzi Khân*' *read* '*Fatâwa Kâzi Khân*' and throughout.
,, 17, line 13, *for* '*Fatâwa-i-Alamgiri*' *read* '*Fatâwa Alamgiri*' and throughout.
,, 18, ,, 16, *for* '*Fath-al-Kadir*' *read* '*Fath-ul-Kadir*' and throughout.
,, 20, ,, 7, *for* '*Kuniat-ul-Munia*' *read* '*Kiniat-ul-Munia*,' and throughout.
,, 40, ,, 27, *for* '*Sadkah*' *read* '*Sadakah.*'
,, 48, ,, 10, *for* متغرق *read* مستغرق
,, 85, ,, 27, *for* '*Kabz-i-Kâmil*' *read* '*Kabz-ul-Kâmil.*'
,, 111, ,, 24, *for* 'Makki' *read* 'Mahki.'
,, 116, ,, 15, *for* '*Sadkah*' *read* '*Sadakah*' and throughout.
,, 117, ,, 6, *for* 'authorize' *read* 'authorise.'
,, 152, ,, 2, omit 'or trusts' throughout.
,, 152, ,, 5, *for* '*trusts*' *read* '*wakf*' and throughout.
,, 153, ,, 4, *for* 'son' *read* 'children.'
,, 153, ,, 7, *for* '*Baruah*' *read* '*Ruma.*'
,, 157, ,, 15, *for* '*wâhif*' *read* '*wâkif.*'
,, 166, ,, 18, omit the word 'will' after '*wakf.*'
,, 170, ,, 12, *for* '*wasiut*' *read* '*wasiat*' and throughout.
,, 173, ,, last line, *for* 'Vol. II, p. 421' *read* 'Vol. I, p. 444.'
,, 180, lines 15 and 18, omit quotation marks.
,, 182, line 4, for '*Moukoofa*' *read*, '*Mowkoofa*' and throughout.
,, 189, line 4 from bottom, *for* 'for' *read* 'from.'
,, 190, ,, 25, add 'الفقراء' after 'لم يذكر'
,, 191, ,, 6 from bottom, *for* 'trust' *read* 'purpose.'
,, 192, ,, 20, *for* لفقراء *read* للفقراء
,, 195, ,, 15, *for* 'fatwa' *read* 'Fatwa.'
,, 195, ,, 27, *for* '*Jan Bibee* vs. *Abdoollah Barber*' *read* '*Jaun Beebee* vs. *Abdollah Barber.*'
,, 201, ,, 3, *for* 'can' *read* 'could.'
,, 201, ,, 3, *for* 'will' *read* 'would.'
,, 211, ,, 4, *for* '*wakf*' *read* '*wakf*.'
,, 220, ,, 25, *for* 'Consequently, if the *wâkif* make a *wakf* on his children and his posterity and give it at the end to the indigent, it is lawful' *read* 'And consequently if a *Zimmi* make a *wakf* on his children and his posterity and give it at the end to the indigent, it is lawful [equally with that made by a Moslem].'

Page 223, line 13, omit from 'which' to 'rules.'

223, line 15 from bottom' *for* 'Osmân made a *wakf* of his lands on his descendants and that *wakf* also is still continuing' *read* 'Osmân made a *wakf* of *Rûma* and that [*wakf*] still exists and Amr ibn-ul-Âûs [the Amru of European history] made a *wakf* of his lands at *Wahat* near Tâyef upon his descendants, and that *wakf* also is still continuing."

,, 223, line 10 from bottom, insert 153 after p.

,, 223, line 3 from bottom, *for* 'ibn wâkkâs' *read* 'ibn Abi Wakkâs.'

,, 224, line 6, *for* Ibn-i-Abû Laila' *read* 'Ibn Abi Laila.'

,, 224, last line, omit 'and their.'

,, 225, line 12, *for* 'though he does not deal with it in detail' *read* 'and not controverting it.'

,, 226, marginal note, *for* 'Trusts' *read* '*wakfs*.'

,, 228, line 9, for 'Ulu'lwalji' *read* 'Ululwa'lji.

,, 231, line 14, *for* 'So, if a man were to constitute a *wakf* for his children and his *nasl* (posterity) and destine it after them for the poor, that will be lawful' *read* 'And consequently if a *Zimmi* make a *wakf* on his children and his posterity and give it at the end to the indigent, it is lawful [equally with that made by a Moslem].'

,, 232, line 14, *for* 'will remain current for me' *read* 'will be for me.'

,, 244, line 15, from bottom *for* 'codes' *read* 'cover.'

,, 245 (page mark) *for* '542' *read* '245.'

,, 245, line 17, *for* 'Such usufruct' *read* 'Such portion of the usufruct.'

,, 252, line 16, from bottom, *for* 'alid' *read* 'valid.'

,, 255, line 13 from bottom, after the word 'ultimate' insert the word 'dedication.'

,, 264, line 4 from bottom *for* '*wâkif's* descendants' *read* 'the *wâkif's* descendants.'

,, 264, line 5 from bottom *for* '*wâhif*' *read* '*wâkif*.'

,, 303, line 2, for 'Public and Quasi-Public *wakfs*' *read* 'the Objects of *Wakf* (*continued.*')

,, 332, line 28, *for* 'the and' *read* 'the land.'

,, 369, line 25, *for* رشد *read* ارشد

,, 369, line 30, *for* فضل *read* افضل

,, 379, line 13, *for* 'Alias-Sugdi' *read* 'Ali As-Sugdi.'

,, 385, line 8, *for* 'Mahomedan' *read* 'Mahommedan.'

,, 385, line 25, *for* 'usufruct' *read* 'corpus.'

,, 385, line 33, *for* descendable' *read* 'descendible.'

,, 401, marginal note, omit 'or the *cestuis qui trustent*.'

,, 433, line 4, from bottom, *for* '*cestui qui trust*' *read* '*Mowkoof-Alaihim*.'

,, 453, line 20, *for* '*cestui qui trust*' *read* '*Mowkoof-Alaih*.'

,, 488, line 13, *for* '*Wujuh-u-Khair*' *read* '*Wujjuh-ul-Khair*.'

,, 491, line 16, *for* '*Mohakkik*' *read* 'Mohakkik.'

,, 594, line 25, for '*Shafi-i-Shafik* read '*Shafi-i-Sharik*.'

,, 597, line 5, from bottom, for '*Ishtish-hâd*' read '*Istish hâd*.'

,, 509, line 5, *ditto*.

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INTRODUCTION.

In India, the Legislature has preserved intact the laws of the Mussulmans in all matters relating to inheritance and to dispositions of property. Excepting the special statutes which are of general application and which are properly speaking municipal laws, there is no *lex loci* in this country. In India, the law is, in the main, personal. This not only adds to the difficulty of legislation, but considerably enhances the risk of failure in the administration of justice. In the case of the Mahommedan Law especially, clothed as it is for the most part in the garb of an unfamiliar language, it is often extremely difficult to ascertain and apply its principles. And it is on this account that latterly considerable reluctance has been evinced by some of the Judges in this country to give effect to the principles of the Mahommedan Law; and the English Law has been invoked either to cut down or to explain away the meaning of the Mahommedan Law. To me, these indirect endeavours to repeal the laws of the Mussulmans, so far as they are preserved by the British rule, seems to be in direct conflict with the spirit of British legislation.

The British Government at the commencement of its ascendancy in this country assured to the inhabitants of India by a solemn Act of Parliament the full enjoyment of their laws and customs. One of the objects of that Act[1] as stated in the Preamble, was "that the inhabitants should be maintained and protected in the enjoyment of all their ancient laws, usages, rights and privileges." Had the question been *res integra*, it would have been fairly open to contention, whether it was ever the intention of the Legislature to make any change in the personal laws of the inhabitants of this country, of whatever race or creed. Regard, however, being had to the

[1] 21 Geo. III, cap. 71.

decision in the case of *Musleah* v. *Musleah*[1] and other cases, it would appear that the tendency of the Courts has been to restrict the operation of the personal laws, in the main, to Hindus and Mahommedans. The provisions of 21 Geo. III, cap. 71, have been repeatedly re-enunciated in later statutes in England and India, and are now substantially embodied in the Bengal Civil Courts Act (Act VI of 1871), and "constitute one of the most important guarantees given to the people of India by the British rule."[2] The attempt to restrict the operative effect of section 17 to "succession and inheritance," is as distinctly opposed to the wording of the section itself as to the entire course of decisions and the intention of the Legislature. The word "dealing," in fact, would include dispositions. Besides, the Legislature has declared in express terms, that when there is no special enactment governing any particular question, the Courts of Justice should be guided by rules of equity and good conscience, and two well-known Judges of the High Court of Calcutta, STEER and LEVINGE, JJ., have held that it is in conformity with equity and good conscience, that, as between Mahommedans, all questions relating to dispositions of property should be governed by the Mahommedan Law.[3] In *Zohoroodeen Sirdar* v. *Baharoollah Sircar*, those learned Judges expressed themselves in the following terms:—

"It is contended by the pleaders for the plaintiff, special respondent, that the Mahommedan Law is not applicable to a contract of the nature before the Court; that according to section 15, Regulation IV of 1793, it is only on questions of inheritance, marriage and caste that the Court is called upon to decide in conformity to the Mahommedan Law, and that the present matter before the Court not being of the nature above expressed is to be decided by the ordinary rules of equity and good conscience. In answer to this it may be remarked that the Courts of this country have invariably applied in practice, the Mahommedan Law to a variety of cases other than those coming under the denomination of inheritance, marriage, caste, and even if immemorial and recognized practice did not legalize the action of the Courts, it cannot be said that when this Court administers to Mahommedans their own law, they do

[1] Fulton's Rep., p. 420.

[2] Mr. Justice Mahmood in *Mazhar Ali* v. *Budh Sing*, I. L., 7 All., p. 302.

[3] 26th April 1864, Gap Number of the *Weekly Reporter*, p. 187.

otherwise than administer justice according to equity and good conscience."

A similar contention was raised in the case of *Yusuf Ali* v. the *Collector of Tippera*,[1] but the learned Judges (GARTH, C. J. and MACDONELL, J.) decided the question before them on the basis of the Mahommedan Law.

It has been emphatically recognized by the Bombay High Court that the Mahommedan Law should be applied in the construction of deeds dealing with property executed by Mahommedans, whatever may be the language in which the disposition is made.[2] And in the case of *H. H. Azimunnissa Begum* v. *Clement Dale*, Mr. Justice Bittleston dealing with the question whether 13 Eliz., cap. VI and 27 Eliz., cap. IV were applicable to Hindoos and Mahommedans expressed himself thus: "In Morton's Cal. Rep., 358, there is a *semble* that the statute (which is *in pari materia*) 13 Eliz., cap. VI, appears to be considered as extending in India; and in a case arising entirely between British subjects, other than Hindus or Mahommedans, I am disposed to think that in accordance with the reasoning in *Freeman* v. *Fairlie* (1 Moo. I. A., p. 305) and the *Mayor of Lyons* v. *The E. I. C.*, id., p. 175, the statute 27 Elizabeth ought also to be so considered. But the gift in this case was by a Mahommedan to a Mahommedan, and any question as to its validity must, I think, be decided by Mahommedan Law. It is true that the defendant is not a Mahommedan but an European British subject, and the persons from whom he claims, *i.e.*, the Nawab's creditors, were also in one case, *viz.*, as respects Turnbull's Garden, not Mahommedans, but East Indians, who would be governed by English Law; but this cannot affect the plaintiff's title. The provisions of the Charter of the Supreme Court is that 'in the cases of Mahommedans, their inheritance and succession to lands, rents and goods, and all matters of contract and dealing between party and party, shall be determined by the law and usages of the Mahommedans; and when one of the parties shall be a Mahommedan by the laws and usages of the defendant.' But that does not mean that whenever the defendant in

[1] I. L. R., 9 Cal., p. 141.

[2] *Gangabai* v. *Thakar Mulla*, 1 Bom. High Court Reports, p. 71, *per* SAUSSE, C. J. See also *Fatima Bibee* v. *The Advocate-General*, I. L., 6 Bom., p. 42, *per* WEST, J; and *Gusain* v. *Gosain*, 6 Moo. I. A., p. 81.

a suit is an European British subject, no law but the law of England shall be applied to ascertain the validity of any past transactions which may be brought under consideration in the suit. Its only effect, as I apprehend, is this, that when a dealing takes place between two parties, of whom one only is Mahommedan, and a suit is brought in respect of that transaction, the dispute between these parties is to be decided according to the law of the defendant. The transaction on which the plaintiff's title depends, was, however, between Mahommedans only, and though the donor afterwards dealt with persons not Mahommedans, and not subject to Mahommedan Law, the plaintiff was no party to any such dealing, and she cannot by the Nawab's acts be rendered subject (as regards her property) to any other than the Mahommedan Law."[1]

In *Moonshee Buzloor Ruheem* v. *Shumsoon-nissa Begum*,[2] the Judicial Committee of the Privy Council dealing with certain remarks of the Judges of the High Court of Calcutta, refusing to follow the Mahommedan Law in that case, made the following observations :—

"Their Lordships most emphatically dissent from that conclusion. It is, in their opinion, opposed to the whole policy of the law in British India, and particularly to the enactment already referred to (Reg. IV of 1793, Sec. 15), which directs, that in suits regarding marriage and caste, and all religious usages and institutions, the Mahommedan Laws with respect to Mahommedans, and the Hindu Laws with regard to Hindus are to be considered as the general rules by which Judges are to form their decisions; and they can conceive nothing more likely to give just alarm to the Mahommedan community than to learn by a judicial decision that their law, the application of which has been justly secured to them, is to be over-ridden upon a question which so materially concerns their domestic relations."

Mahommedan jurisprudence.

Of all systems of law, the Islâmic system furnishes, from an historical point of view, the most interesting phenomenon of growth. The small beginnings from which it grew up, and the short space of time within which it attained its wonderful development, mark its position as one of the most important juridical systems in the civilized world.

[1] 6 Mad. High Court Reports, p. 488. [2] 11 Moo. I. A., p. 614.

The grand superstructure of Islâmic jurisprudence is founded on the Koranic laws and the traditional sayings of the Prophet, but much of the coping-stone was supplied at Bagdad, in Bokhara, in Syria, in Andalusia and Persia. In another work I have pointed out that the domestic laws of Islâm have a great analogy to the Rabbinical Law. Similarly, many of the conceptions of the Saracenic jurists, who flourished in the full tide of Moslem glory and ascendancy, bear a strong and startling analogy to the rules of the Roman Civil Law on cognate subjects. Often the analogy is so startling as to make the careful and critical student ask himself whether it arises from mere accidental coincidence, or is it the result of mutual action and reaction? Considering the close proximity of the two nations and their frequent contact in schools and colleges, as in the field and in the hall, it is impossible to suppose that Byzantine ideas exercised no influence on the legal conceptions of the Arabian jurists.

Shiah and Sunni.

The unhappy schism, which at this moment divides the Islâmic world into the two great sects of Shiahs and Sunnis, owed its origin to secular causes which led ultimately to a wide divergence in their juridical conceptions. It originated with dynastic questions, and grew into a separation on doctrinal and legal points. The great Sunni sect is divided in its own bosom into four schools; and the doctrinal and legal differences among them are as great as between the Shiahs and any one of the Sunni schools, and yet they are not regarded by each other with the same bitterness as collectively they regard the Shiahs. The reason is plain, and is to be found in the reception which the two sects accorded to the doctrine of the *Imâmate*.

Imâmate.

The question of the *Imâmate*, that is "the spiritual headship of the Mussulman Commonwealth," forms the distinctive feature of difference between the Sunnis and the Shiahs, and gives a characteristic complexion to the juridical doctrines of the two schools. The Shiahs repudiate entirely the authority of the *Jamâat*, (or the universality of the people,) to elect a spiritual chief who should supersede the rightful claims of the persons indicated by the Founder of the Faith, whilst the Sunnis regard the decisions of the assemblies, however obtained, as of œcumenical importance. The question came up for discussion and settlement immediately on the decease of Mohammed when it became necessary to elect a Caliph or successor to the Prophet to assume the leadership of Islâm. The

Hâshimites, the kinsmen of Mohammed, maintained that the office belonged by right to Ali as one who had been pointed out by the Prophet as his successor. The other Koreishites, who were traditionally hostile to the Banî Hâshim, insisted upon proceeding by election. Whilst the Banû Hâshim were engaged in the obsequies of Mohammed, Abû Bakr was elected to the office of Caliph by the votes of the Koreish.

Abû Bakr died in the third year of his Caliphate[1] and was succeeded by Omar (*Ibn-al-Khattâb*). Under this Caliph the conquest of Syria, Egypt and Persia was achieved by the Moslems. Upon his decease the Caliphate was offered to Ali on condition that he should govern in accordance with the precedents established by the two former Caliphs. Ali declined to accept the office on those terms, declaring that in all cases respecting which he found no positive law or decision of the Prophet, he would rely upon his own judgment. This notable declaration forms another point of difference between the Shiahs and the Sunnis. The Caliphate was then offered to Osmân who consented to the terms imposed by the electoral body. The legal divergence between the Sunni and the Shiah schools dates virtually from this epoch. The willingness of Osmân to follow implicitly the precedents established by Abû Bakr and Omar, without any question as to their applicability to the ever-varying exigencies of human life, impressed a distinctive character upon the Sunni doctrines. Both Abû Bakr and Omar had during their Caliphates deferred to Ali's exposition of the law; and judgments were invariably given according to his interpretation of the traditions. Osmân seems to have set a different example. This well-intentioned but weak chief, governed entirely by his secretary and kinsman Merwân, afterwards a Caliph himself, was killed, after a short and troubled reign, by the revolted Egyptian soldiery led by Mohammed the son of Abû Bakr. Upon his death Ali was elected to the Caliphate. His accession was the signal for two fierce revolts on the part of the opposite faction. The one which was headed by Âyesha, the daughter of Abû Bakr, was suppressed without much difficulty; the other was more successful. Osmân had, during his lifetime, appointed one of his kinsmen Muâwiyah, the son of Abû Sufiân, to the Governorship of Syria. This ambitious chief perceived in the murder of Osmân an opportunity for

[1] August 634, A. C.

his own aggrandisement; and the insurrection raised by him proved, indirectly, the cause of the many disasters which have befallen Islâm. Defeated in several consecutive battles, he appealed to arbitration which was agreed to by Ali with the object of avoiding further bloodshed. Abû Mûsa al-Ashaâry was appointed arbitrator on behalf of the House of Mohammed, and Amr-ibn-al-Aâs on behalf of Muâwiyah. Amr persuaded Abû Mûsa that, with the view of healing the wounds which the differences between Ali and Muâwiyah had inflicted on the Moslem world, it was necessary to set aside both chiefs and elect another Çaliph. Abû Mûsa agreed to the suggestion, and on the people assembling to hear the verdict of the arbitrators, he pronounced the deposition of both Muâwiyah and Ali. He was followed by Amr-ibn-al-Aâs, who declared that he agreed with Abû Mûsa in deposing Ali, but that he confirmed Muâwiyah in his office. The boldness of the artifice, and the shamelessness with which it was carried into effect struck with dismay all those who had seen in the arbitration a means for preventing further bloodshed in Islâm. This proceeding of Amr-ibn-al-Aâs exasperated the Fatimides, and both parties separated vowing undying hatred towards each other. Ali was shortly after assassinated whilst engaged in prayers in a mosque at Kûfa.[1] His assassination enabled Muâwiyah to consolidate his power both in Syria and Hijaz.

Until the accession of this chief to the office of the Caliphate, which the stern virtues of the early Caliphs had sanctified and adorned, no distinctive appellation was assigned to or assumed by either party. The partisans of Ali were known simply as the Banû-Hâshim. Under Muâwiyah, the followers of the House of Mohammed began to be called "Shiahs" or "adherents;"[2] whilst the partisans of Muâwiyah were called *Amawis*. When the Abbassides acquired the dominion, the faction which advocated the principle of election in preference to hereditary succession adopted the name of *Ahl-i-Sunnat wa Jamâat* ("People of the Traditions and the Assembly").[3] The Fatimides adopted green, the colour of the

[1] Mr. Justice Arnold calls Ali, "the most heroic of that time, most fruitful in heroes."

[2] In the *Jawâhir-ul-Kalâm*, the term "Shiah" is explained as meaning "a propagator of the true doctrine."

[3] See my *Life and Teachings of Mohammed, or The Spirit of Islâm*, p. 528, where I have explained the subject fully.

Prophet, as the symbol of their cause; the Banû Ommeyya, on the other hand, assumed white for their standard. Up to this time the divergence between the two factions was chiefly political and dynastic. Their doctrinal and legal differences began now to assume the type and proportions they retain at the present moment. The Shiahs reject not only the decisions of the Œcumenical Councils, but also all traditions not handed down by Ali or his immediate descendants—those who had seen the Prophet and held familiar intercourse with him.

Though the Mahommedan Law purports to be founded essentially on the Koran, most of the rules and principles which now regulate the lives of Moslems are not to be found there. It undoubtedly contains the germs of the fundamental principles which regulate the various relations of life; the religious, civil, and criminal laws which provide for the constitution and continuance of the body politic; and even of political rules and social economy. The absence of a systematic arrangement, which has frequently been considered as its greatest defect, is explained by the circumstance that it was gradually built up during the lifetime of the Prophet. The moral principles and the legal rules, which make up the work, were enunciated, not simultaneously as a completed Code of Law, but in accordance with the exigencies of the moment and the passing requirements of each special case arising in the midst of a simple and primitive society.

According to the Shiah doctrine, the oral precepts of the Prophet are in their nature supplementary to the Koranic ordinances, and their binding effect depends on the degree of harmony existing between them and the laws of the Koran. Thus, those traditions which seem to be in conflict with the positive directions in the text are considered to be apocryphal. The process of elimination is conducted upon certain recognised principles founded upon logical rules and definite data. These rules have acquired a distinctive type among the Mutazalas, who have eliminated from the Hadîs Kudsî, (the holy traditions,) such alleged sayings of the Prophet as appeared incompatible and out of harmony with his developed teachings, as explained and illustrated by the philosophers and jurists of his race.

The Sunnis, on the other hand, base their doctrines on the entirety of the traditions. They regard the concordant decisions of the

successive Caliphs and of the general assemblies, (Ijmâa-i-Ummat,) as supplementing the Koranic rules and regulations, and as almost equal in authority to them.

According to the Sunni doctrines, the sources of the Mahommedan Law are invariable in their order and limited in their number. With reference to these fundamental bases of jurisprudence, as they are called, there is little or no divergence among the several branches of the Sunni school, though they differ much in their mode of interpretation and exposition of the laws. (1) The Koran; (2) The *Hadis* or *Sunnat*, (traditions handed down from the Prophet); (3) the *Ijmâa-i-Ummat*, (concordance among the followers); and (4) the *Kiyâs*, (private judgment,) constitute the bases upon which Sunni jurisprudence is essentially founded. The *Hadis* (pl. *Ahâdis*) embraces (*a*) all the words, counsels, and oral laws of the Prophet (*Kawl*); (*b*) his actions, his works, and daily practices (*Fyl*); (*c*) and his silence (*Takrîr*) implying a tacit approbation on his part of any individual act committed by his disciples. The rules deduced from these subsidiary sources vary considerably in respect of the degree of authority which is attached to them. If the rules, or traditional precepts, are of public and universal notoriety (*Ahâdis-i-mutwâttirèh,*) they are regarded as absolutely authentic and decisive. If the traditions, though known publicly by a great majority of people, do not possess the character of universal notoriety, they are designated as *Ahâdis-i-mashhûrat*; whilst the *Akhbâr-i-wâhid*, which depend for their authenticity upon the authority of isolated individuals, have little or no value attached to them. Thus, every tradition purporting to be handed down by the contemporaries and companions of the Prophet, regardless of their actual relationship to him, is considered to be authentic and genuine, provided certain arbitrary conditions, framed with the view of testing the value of personal testimony, are complied with.

(3) *Ijmâa-i-Ummat* implies general concordance. Under this collective name are included all the apostolic laws, the explanations, glosses, and decisions of the leading disciples of the Prophet, especially of the first four Caliphs (the *Khulâfâ-i-Râshidîn*) on theological, civil and criminal matters.

(4) *Kiyâs*, the exercise of private judgment forms the principal point of difference among the four sub-divisions of the Sunni school of jurisprudence.

The Shiahs do not admit the genuineness of any tradition not received from the *Ahl-i-Bait*, ("the People of the House,") consisting of Ali and Fâtima and their children, and repudiate entirely the validity of all decisions not passed by their own spiritual leaders and Imâms. In the application of private or analytical judgment, and in drawing conclusions from the ancient precedents, they also differ widely from the Sunnis.

The persecutions to which the Shiahs have been, from time to time, subjected,—have created a marked impression upon their legal conceptions regarding the connection between the secular and the spiritual power,—the Church and the State.[1] Partly in consequence of the mysterious disappearance of their last Imâm, and the existing belief that he is still alive and will reappear to overthrow the enemies of Islâm, and partly owing to the frequent repression from which they have suffered, the Shiahs have entirely dissociated the secular from the spiritual power. In Shiah countries, the Church and the State are entirely distinct from each other. Though a Shiah sovereign bows to the authority of the Mujtahids, (expounders of the law,) he submits to them not so much as spiritual chiefs, but rather as counsellors whose views should be adopted in secular matters as the reflex probably of the opinions of the invisible Leader or Imâm. Until the Saffavian sovereigns made the Shiah creed the State-religion of Persia, it was the religion of a persecuted and hated sect.

The effect of this separation of the spiritual from the temporal power is most clearly marked in the doctrine of escheats. According to the Shiahs there is no escheat to the *Bait-ul-Mâl* (the public treasury). The idea of a *Bait-ul-Mâl* is "abhorrent" to the Shiah creed. All escheats, which occur only in cases where the deceased leaves no possible heir, go to the spiritual Imâm, and in his absence (*ghibat*) to his representative, (the Mujtahid,) who distributes the proceeds among the poor of the intestate's native city.

The Shiahs are divided into several sub-sections; for example, the *Asnâ Aasharias* or *Imâmias*, (the followers of the twelve Imâms,) the *Ismailias*, the followers of Ismail, one of the sons of the Imâm Jaafar as-Sâdik (the sixth Imâm),[2] the *Zaidias*, the *Bâtinias* (the

[1] 1 D'Ohsson, *Tableau Generale de l' Empire Ottoman*, p. 76.

[2] See *The Spirit of Islâm*, p. 476.

allegorists), &c. They differ from each other not so much on the interpretation of the law as on doctrinal points. The school of the Mutazalas, an offshoot from the Shiah branch, bears the closest analogy to the early Medinite school of the Fatimide Imâms. The rise of Mutazalaism forms one of the most interesting features in the history of Islâm.[1] It originated in the secession of Wâsil bin Aatâ, a contemporary of Abû Hanîfa, from the doctrines taught by Imâm Hassan al-Basrî (of Bussorah).

Hassan was educated in the school of the early Fatimide philosophers and the liberality of his views contrasted remarkably with that of his age. Wâsil had imbibed his knowledge at the same source, but he separated from Hassan on the question of free-will and predestination, and founded a school of his own. His disciples have, from the fact of his secession, assumed the designation of *Mutazalas* or *Ahl-ul-Itizâl* (Dissenters or Protestants). Proceeding upon the lines of the Fatimide philosophers and appropriating the principles which they had laid down, Wâsil formulated into theses the doctrines which constituted the basis of his difference from patristicism generally. His impulsiveness often led him to overstep the bounds of moderation in his antagonism to intellectual tyranny, yet the general rationalism of his school rallied round his standard the most advanced and cultured minds. Imâm Zamakhshari, (the author of the *Kashshâf*,) Abu'l Hassan Ali al-Masûdi,[2] "Imâm, historian and doctor," Mirkhond and Khondemir, authors of the *Rouzat-us-Safa* and *Habîb-us-Siyar* were all Mutazalas. There can be no doubt, that the moderate Mutazalas represented the views of Ali and the most liberal and learned of his early descendants, for the doctrines of the Fatimides bears the closest analogy to those of the school founded by Wâsil and reformed by Zamakhshari.[3] It is a well-known fact that the chief doctors of the Mutazalas were either Fatimides themselves or were educated under the Fatimides.

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[1] See *The Spirit of Islâm*, p. 609.

[2] The "far-famed" author of the *Murâj-uz-zaheb*, "the field of gold." This great writer who has been styled the Herodotus of the East, was not only a philosopher, a historian and a geographer but a voluminous writer on Shiah traditions.

[3] The great author of the *Kashshâf*, a most important, learned, and well-reasoned commentary on the Koran "a production the like of which," says Ibn-i-Khallikân, "had never before appeared on the interpretation of the Koran." Imâm Zamakhshari was born in 1075 A. C. and died in 1144 A. C.

The Mutazalas maintain that justice is the animating principle of human actions, justice being the embodiment in action of the dictates of reason. They maintain further that there is no eternal, immutable law as regards the actions of man, and that the divine ordinances which regulate his conduct are the result of individual and collective development; that, in fact, the commands and the prohibitions, "the promises and the threats," which have been promulgated among, or held out, to mankind, have invariably been in consonance with the progress of humanity, and that the Law has always grown with the growth of the human mind. The doctrines of the *Ahl-ul-Itizâl* were adopted by Abdullah al-Mâmûn. He and his two immediate successors strived to introduce the Mutazalite philosophy and theology throughout the Moslem world. Unfortunately for Islâm, patristicism proved too powerful even for those sovereign pontiffs, and the triumph of a factitious orthodoxy, opposed to all improvement and progress under the bigot Mutawwakkil, led eventually to the downfall of the Caliphate.

The Indian Shiahs are chiefly *Asnâ Aasharias* or *Imâmias*. The Khojahs of Bombay are *Ismailias*, but they may well be left out of consideration, as on legal questions they are for the most part governed by Hindu customs.[1] The *Asnâ Aasharias* are divided into two sub-sections, the *Akhbâri* and the *Usûli*, namely, (1) those who adhere blindly to the interpretations of the Mujtahids (the jurists of their school), and (2) those who absolutely deny the influence of authority on matters of opinion unless such authority should be in harmony with the dictates of reason and judgment.[2] The *Usûlis* allow the exercise of *Kiyâs* (private judgment) on every legal question, and as will be seen hereafter coincide in this respect with the principal Sunni school. The *Usûlis* follow the Mutazalite interpretation of the law and the doctrine of evolution.

In A. H. 905 (A. C. 1499), Shah Ismail Saffavi, the great founder of the Saffavian dynasty, adopted the Shiah doctrines as the national religion and law of the Persians, which have continued so from that period until the present time, notwithstanding the violent efforts of the Afghan usurper Ashraf and the cruel Nâdir Shah to sub-

[1] *Shivji-Hassan* v. *Datu Marji Khoja*, 12 Bom. Reports, p. 281; see also *Hirbai* v. *Gorhai*, ibid, p. 294. The Borahs, who are also Ismailias, are distinct from the Khojahs, and when not governed by customs are subject to the *Asna-Aasharia* Law.

[2] See *The Spirit of Islâm*, p. 511 et seq.

stitute the Sunni creed. Until the return of Humâyûn from Persia in the year 1555, the Shiahs were confined chiefly to the kingdoms of Bijapur and Golconda. The Bahmani and Aâdil-shâhî sovereigns were Shiahs, and with the doctrines of the Persians they had also borrowed Persian culture. When Humâyûn returned to India after the death of Shèr Shah Suri, he is alleged to have come back pledged to introduce the Shiah doctrines in return for the Persian support. Whatever truth there may be in this report, there can no doubt that many learned men accompanied Humâyûn to this country and established themselves here. Shiahism began to spread among the people, though the State-religion continued to be Sunni. Shah Shujah, Shah Jehan's second son, was a Shiah. In 1847, King Amjad Ali Shah made the Shiah religion the State-religion in Oudh.

There are now many Shiahs in Hijâz, and in the eastern portions of Arabia. Historically, the Shiah school dates further back than that of the Sunnis.

The four principal schools of law among the Sunnis, named after their founders, originated with certain great jurists to whom has been assigned the distinguished position of *Mujtahid Imâms*, namely, Expounders of Law *par excellence*. By virtue of their learning and their eminence, they were entitled not to be bound in the interpretation of the law by any precedent, but to interpret it according to their own judgment and analogy (*kyâs*). Though the doctrines of these schools are essentially the same as regards fundamental dogmas (*usûl*), they differ from each other in the respective weight allowed to *kyâs*, and the application of private judgment in the interpretation and exposition of the law.

The founder of the first distinctive juridical school among the Sunnis was Abû Hanîfa. He was born in the year 80 of the Hijra (Hegira), during the reign of Abdul Malik ibn Merwân, was educated in the Shiah school of law, and received his first instructions in jurisprudence from the Imâm Jaafar as-Sûdik (the sixth Imâm of the House of Mohammed). He received his knowledge of the traditions from Abû Abdullah ibn al-Mubârak and Hâmid ibn Sulaiman. This great jurist often quotes the Fatimide Imâm as his authority. On his return to his native city of Kûfa, though he continued to remain a zealous and consistent partisan of the House of Ali, he seceded from the Shiah school of law, and founded a system of his

own diverging completely on many important points from the doctrines of the Shiahs; and yet so close is the resemblance between his exposition of the law and their views, that there is no reason to doubt the source from which he derived his original inspiration. The latitude which he allowed to private judgment in the interpretation of the law seems to be unquestionably a reflex of the opinions of the Fatimide doctors. Abû Hanîfa died in the year A. H. 150. The school which he founded goes by the name of Hanafî, and is in force among the major portion of the Indian Mussulmans, among the Afghans, Turkomans, almost all Central Asian Mahommedans, the Turks and Egyptians. In fact, his school owns by far the largest number of followers. Abû Hanîfa's teachings were amplified, illustrated, and explained by his two great disciples, Abû Yusuf and Mohammed.

Abû Yusuf (Yaakub ibn Ibrâhîm al-Kûfi) was born in A. H. 113 (A. C. 731), and died at Baghdad in A. H. 182 (A. C. 798). He was a pupil of Abû Hanîfa and was first appointed to the office of Kâzi of Baghdad by the Caliph al-Hâdi; subsequently he was raised to the dignity of Kâzi-ul-Kuzzât or Chief Justiciary by the Caliph Hârûn ar-Rashîd, being the first who held that high office.

A collection of the decisions of Abû Yusuf was published under the auspices of the Vizier of Hârûn, Jaafar ibn Yehya Barmaki, (the Barmecide,) and hence called the *Fatâwa-i-Barâmika*. It is frequently referred to by the text-writers.

Abû Abdullah Mohammed ibn Hussain ash-Shaibani was born at Wâsit in Mesopotamia in A. H. 132 (A. C. 749) and died at Rai in A. H. 187 (A. C. 802). The Imâm Mohammed, as he is most generally called, was a fellow-pupil of Abû Yusuf under Abû Hanîfa, and on the death of the latter pursued his studies under Abû Yusuf. He has left a number of works upon which commentaries have been written by some of the foremost jurists of the Hanafî school.

So far as secular law is concerned, the two disciples have eclipsed completely the fame of their master and their authority in all temporal matters is undisputed. Sir William Jones says, "that although Abû Hanîfa be the acknowledged head of the prevailing sect, and has given his name to it, yet so great is the veneration paid to Abû Yusuf and the lawyer Mohammed that, when they both dissent from their master, the Mussulman Judge is at liberty to adopt either of

the two decisions which seem to him the more consonant to reason and founded on the better authority."[1]

Whatever may have been the view in former times regarding the respective authority of Abû Hanîfa and his disciples, there is a general consensus of opinion among modern Mussulman lawyers that his dicta should be followed *only* in religious matters. In the *Hamâdia* it is stated that "the *Fatwâs* (decisions) are given primarily according to the doctrine of Abû Hanîfa, next according to Abû Yusuf, next according to Imâm Mohammed, next according to Ziffer, and then according to Hassan ibn Ziyâd. It is said that if Abû Hanîfa be of one opinion and his two disciples of another, the Mufti is at liberty to choose either, but the preceding rule must be observed when the Mufti is not a scientific jurist (and therefore not competent to judge of the opposite opinions). This view is expressed in the *Kinia. In judicial decrees, however, a preference is given to the doctrine of Abû Yusuf (who was an eminent Judge)*, for Imâm Sarakhsi has declared it safe to rely upon Abû Yusuf in judicial matters, and that the learned have followed him in such cases, though if there be a difference between the two disciples whoever agrees with Abû Hanîfa should be preferred. The joint opinion of the disciples may also be adopted, though different from that of Abû Hanîfa, if the difference appear to proceed from a change of human affairs (lit. a change of men and alteration of times); and *modern lawyers are agreed that the doctrine of the two disciples should be adopted for adjudication in matters of civil justice.*"

Dealing with the duties of the Mufti (Jurisconsult and Judge), Kâzi Khân speaks thus, "if it is a question on which our masters are disagreed, then it must be seen whether any of the disciples is in agreement with Abû Hanîfa. In that case, the opinion of Abû Hanîfa and of that disciple who agrees with him should be adopted, because the arguments are strong on their side. If both the disciples disagree from Abû Hanîfa, then it must be considered whether their disagreement arises from change in the times, that is; whether the decision should be in accord with the requirements of the especial circumstances of the time and place and people; when that is so, the opinion of the two disciples should be followed, for there is always a change in the conditions of mankind. *In matters*

[1] Sir William Jones's Works, Vol. III, p. 510; 1, Harrington's *Analysis*, p. 228; *Fatâwa-i-Hamâdia*, p. 175.

pertaining to civil transactions, contracts, and such like, the views of Abû Yusuf should be adopted."[1]

For the last six centuries it has been universally recognised among the *Hanafi* Sunnis that *Fatwâs* or judicial decrees should be delivered according to the opinion of Abû Yusuf in all matters relating to dispositions of property; whilst the views of Mohammed should be generally followed in questions of inheritance. In the case of *Doe dem Jaun Bibee and another* v. *Abdullah Barber*,[2] on a question relating to the law of *wakfs*, the Supreme Court, (Ryan, C. J., and Grant, J.,) held that, according to the modern doctrine of Mahommedan decisions and lawyers, Abû Yusuf's opinion was to be considered the better law.

After Abû Hanîfa and his two disciples, the next in authority among the Hanafîs of India are the Imâm Zîffer ibn al-Hâzil, Chief Judge at Bussorah or Basra, where he died in A. H. 158 (A. C. 774); and Hassan bin Ziyâd. These lawyers were contemporaries, friends and scholars of Abû Hanîfa, and their works are quoted as authorities for that Imâm's doctrines in matters upon which the two disciples are silent.[3]

The legal works which have for the last eight centuries been regarded as binding authorities among the Hanafîs are generally divided into two groups, *viz.*, (1) Text-books, and (2) Digests of Decisions which pass under the name of *Fatâwa*.

Among the Hanafî jurists and text-writers the following are the most noted :—

Abû Bakr Ahmed ibn Omar al-Khassâf was the author of the most celebrated of several treatises known by the name of *Âdâb-ul-Kâzi* (*the Duties of the Kâzi or Judge*). He died in A. H. 261 (A. C. 874). The most esteemed commentary on Khassâf's *Âdâb-ul-Kâzi* is that of Omar ibn Abdul Aziz bin Mâzeh commonly called Hussâm Shahîd, who was killed in A. H. 536 (A. C. 1141.) Al-Khassâf will be frequently referred to in the following pages.

Abû Jaafar Ahmed ibn Mohammed at-Tahâwi is one of the numerous commentators on the *Jâmaa-as-Saghir* of Imâm Mohammed. He also compiled a synopsis of the Hanafî doctrines called the *Mukhtasar-at-Tahâwi*. Both works are quoted as authorities, but

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[1] *Fatâwa-i-Kâzi Khân*, Vol. I, p.1. [2] Fulton's Reports, p. 345.
[3] D'Ohsson, I, p. 18.

they are not easily available in India. At-Tahâwi died in A. H. 321 (A. C. 933).

Al-Kudûri (Abû Hussain Ahmed ibn Mohammed) is another eminent jurist. His *Mukhtasar*[1] is a work of great weight and authority in India. "Indeed it is in such general repute that Hâjî Khalîfa, when speaking of those several works which are emphatically designated by autonomasia, 'Al-Kitab' or 'the Book,' says that if in matters connected with jurisprudence such expression be used, it signifies the *Mukhtasar al-Kuduri*."[2] It is a general treatise on law and contains upwards of twelve thousand cases. It is only natural that a work of such celebrity should have been commented upon by numerous writers: several of the commentaries upon it are quoted in the *Fatâwa-i-Alamgiri*. Al-Kudûri died in A. H. 428 (A. C. 1036).

There is a well-known commentary on the *Mukhtasar-al-Kuduri*, entitled *aj-Jouharat-un-Nayirèh*, sometimes called *aj-Jouharat-ul-Munîrah*. Barthe says that this work, though of later date than the *Hedâya*, is more valuable in some respects. I have made use of the *Jouharat-un-Nayirèh* as well as the other commentary on the *Mukhtasar* called *Sirâj-ul-Wahâj*.

Shams-ul-Aimmah Abû Bakr Mohammed as-Sarakhsi, the author of several commentaries upon the *Jâmaa-al-Kabîr* and the *Jâmaa-as-Saghîr* of the Imâm Mohammed and other works, whilst in prison at Uzjand compiled a law-book of great merit entitled the *Mabsût*. He was also the author of the most generally quoted of his many works entitled *al-Muhît*, compiled from the *Mabsût*, the *Ziyâdat* and the *Nawâdir* of the Imâm Mohammed. The *Muhît* of Sarakhsi is regarded with great veneration in India, and I have referred to it frequently in this work.

Burhân-ud-din Mohammed ibn Ahmed also wrote a *Muhît* which though known in India is not so highly esteemed as the *Muhît-as-Sarakhsi*. The work of Burhân-ud-din Mohammed is commonly known as the *Muhît-ul-Burhâni* and is taken principally from the *Mabsût*, the *Jâmaas*, the *Siyar* and the *Ziyâdat* of the Imâm Mohammed. The author also utilized the *Nawâdir* of the same doctor in composing his work.

The Shaikh Aalâ-ud-din Mohammed as-Samarkandi composed a

[1] Frequently referred to in the *Alamgiri*.

[2] Morley's *Digest*, I, Introd, p. cclxv.

compendium of Al-Kudûri's *Mukhtasar* which he entitled the *Tuhfa -ul-Fukahâ*. The work of Aalâ-ud-din was commented upon by his pupil Abû Bakr ibn Masûd al-Kashâni who died in A. H. 587 (A. D. 1191). This comment is entitled *Badâia-as-Sanâia*. Both the text and its comment are frequently referred to as authorities.

The *Hedâya* is one of the most celebrated treatises on Hanafî Law. It is a commentary on the *Badâia-al-Mubtada;* and both the text and comment are from the pen of Burhân-ud-din Ali ibn Abû Bakr al-Marghinani, (of Marghinan, in Ferghana,) who is said to have spent thirteen years in compiling the *Hedâya*. He died in A. H. 593 (A. C. 1196).

The *Hedâya* has been illustrated by a large number of commentaries, the first of which was written by Hamîd-ud-dîn Ali al-Bokhârî, who died in A. H. 667 (A. D. 1268) and is a short tract entitled the *Fawâid*. The glosses of the *Hedâya*, which are most reputed in India, are the *Nihâya*, the *Inâya*, the *Ghâit-ul-Bayân* the *Kifâya*, and the *Fath-al-Kadir*.

The first of these the *Nihâya* was composed by Hisâm-ud-din Hussain ibn Ali, who is said to have been a pupil of Burhân-ud-dîn Ali. It is important as supplying the omission of the Law of Inheritance in the *Hedâya*, although the chapter on this subject is supposed not to be equal in authority to the *Farâiz-us-Sirajiyah*.

There are two commentaries on the *Hedâya* entitled the *Inâya*, but the one more commonly known by that name was written by the Shaikh Akmal-ud-dîn Mohammed ibn Mahmûd, who died in A. H. 786 (A. C. 1384). The *Ghâit-ul-Bayan* and the *Kifâya* are by the same author, Imâm-ud-dîn Ameer Kâtib bin Ameer Omar. Both works are extremely valuable and give not only the author's own comments and observations, but also the substance of other commentaries. The *Kifâya* was finished according to Haji Khalîfa in A. H. 747, (A. C. 1347). Both these works have proved of great assistance to me in the compilation of the following pages. By far the most important of these commentaries is the *Fath-al-Kadir*. It is a commentary merely in name, for it contains the opinions, dicta, and decisions of the highest Judges and *Muftis* explaining, illustrating and elucidating the principles of the Hanafî Law as stated by Burhân-ud-din Ali. It also shows the development in the legal conceptions of Jurists and Judges in the course of two centuries. Morley speaks of this work in these terms :—"The

Fath al-kadîr lil-aajâz al-Fakîr by Kamâl ud-dîn âl-Siwâsi, commonly called Ibn Hammâm who died in S. H. 861 (S. C. 1456) is the most comprehensive of all the comments on the *Hidayah*, and includes a collection of decisions which render it extremely useful." Naturally, I have utilised this work to a great extent and refer to it frequently in my compilation. The *Hedâya* was translated into Persian and subsequently into English by Mr. Hamilton under the auspices of Warren Hastings.

Another work which I have made use of for the purposes of my compilation and which is regarded as a work of considerable authority in India is the *Ramz-ul-Hakâik*, a commentary on the *Kanz-ud-Dakâik*, a book of great reputation among the Hanafîs of India, by Allâmah al-Aini Badrud-dîn Mahmûd. Another commentary on the *Kanz-ul-Dakâik* highly thought of in Sunni countries is the *Bahr-ur-Râik* by Allâmah al-Zain ul-aâbidîn ibn Nujaim al-Misri who died in A. H. 970 = A. C. 1562.

Another work of authority is the *Tas-hil*, a commentary on the *Latâif-ul-Ishârât* by Imâm Badr-ud-dîn Mahmûd. I have also made use of this book.

The most celebrated of the law-works published in Turkey is the *Multaka-ul-Abhar* by the Shaikh Ibrâhîm ibn Mohammed al-Halabi[1] (of Aleppo,) who flourished under Solyman the Magnificent, and died in A. H. 956 (A. C. 1549). This work, which is an universal code of the Hanafî Law, contains the opinions of the four chief Mujtahid Imâms and illustrates them by those of the principal jurisconsults of that school. Throughout Turkey, it is more frequently referred to as an authority than any other treatise on jurisprudence. I have frequently referred to this work also.

The *Multaka-ul-Abhar* was published in the original Arabic at Constantinople in A. H. 1251 (A. C. 1835), and a commentary on it entitled the *Majmau-ul-Anhar* by Abdur-Rahman ibn Shaikh Mohammed, commonly known by the name of Shaikh Zâdèh, was published at the same metropolis in A. H. 1240 (A. C. 1824). This commentary is extremely valuable and interesting as it represents the views in vogue among the *Ulemas* of modern Turkey. The *Majmau-ul-Anhar* has been of great use to me in the compilation of this work.

[1] D'Ohsson compiled his own magnificent Digest from this work.

Mulla Khusru,[1] who is one of the most renowned of the Turkish jurisconsults completed his great work called the *Durrur-ul-Akhâm* in A. H. 883 (A. C. 1478). As an authority it is second only to the *Multaka-ul-Abhar*, and is frequently referred to in the later works.

The other class of law-works, *viz.*, the *Fatâwas* (collections of decisions) which I have made of use are the *Fatâwa-i-Kâzi Khân*,[2] the *Fusûl ul-Imâdia*, the *Kuniat-ul-Munia*, the *Fatâwa-i-Zainia*, the *Fatâwa-i-Durr-ul-Mukhtâr*, the *Fatâwa-i-Alamgiri* and the *Fatâwa-i-Ankirâwia* and the *Radd-ul-Muhtâr*.

The first is thus spoken of by Morley :—"The *Fatâwa-i-Kâzi Khân*, or collection of decisions of the Imâm Fakhr-ud-din Hassan Mansur al-Uzjandi al-Farghâni, commonly called Kâzi Khân, who died in A. H. 692 (A. C. 1195) is a work held in the highest estimation in India and indeed is received in the Courts as of equal authority with the *Hedâya* of Burhân-ud-dîn Ali with whom Kâzi Khân was a contemporary : it is replete with cases of common occurrence, and is therefore of great practical utility, the more especially as many of the decisions are illustrated by the proofs and reasoning on which they are founded." As Kâzi Khân was himself a judge as well as a jurist, his decisions are of great value.[2]

The *Fusûl ul-Imâdia* consists of two portions ;—The first composed by Abul Fath Mohammed bin Abû Bakr al-Marghinâni who died at the end of the 7th century of the Hegira ; the other, by Imam Janâl-ud-din bin Imâd-ad-din.

The *Kuniat-ul-Munia* is a collection of decisions of considerable authority by Mukhtâr bin Mahmûd bin Mohammed az-Zâhidi Abû ar-Rija al-Ghaznunî surnamed Najm ud-din who died in A. A. 658 = A. C. 1259.

The *Fatâwa-i-Zainia* contains decisions by Zain al-aâbidin Ibrâhîm bin Nujaim al-Misrî (the Egyptian) the celebrated author of the *Bahr ur-Râik* and the *Ashbâh wan-Nazâir*. They were collected by his son Ahmed about A. H. 970=A. C. 1662.

The *Durr-ul-Mukhtâr* is a commentary on the *Tanwîr-ul-Absâr* of Shaikh Shams ud-din Mohammed bin Abdullah al-Ghâzzi (A. H. 995 = A. C. 1586) itself a work of great authority and merit. The *Durr-ul-Mukhtâr* was written in A. H. 1071=A.C. 1660 by

[1] Died in A. H. 885 (A. C. 1480).

[2] D'Ohsson places Kâzi Khân on a higher footing than the author of the *Hedâya*.

Mohammed Aalâ ud-dîn bin Shaikh Ali al-Hiskafi and is full of most important decisions.

The *Fatâwa-i-Alamgiri* is a digest of cases compiled under the orders of the Emperor Aurungzeb Alamgir (hence the name). It is a work of a comprehensive nature and of great authority in India and is referred to in Western works as *the Hindièh*. In the original, the names of the authorities from which the decisions are collected are invariably given with many of the reasons and often with comments by the compilers, the learned Muftis of the Court. Mr. Niell Baillie who has paraphrased portions of the *Fatâwa-i-Alamgiri* has omitted altogether the authorities and often the comments and reasons, with the result that the reader unable to get at the original finds a certain amount of incoherency and sometimes divergences which do not appear in the Arabic.

The *Fatâwa-i-Ankirâwia* is a collection of the decisions of Imâm al-Ankirâwi by the Shaikh-ul-Islâm Mohammed bin al-Hussain who died in A. H. 1098 = A. C. 1686.

By far, however, the most practical and well-reasoned work of this class is the *Radd-ul-Muhtâr*,[1] a commentary on the *Durr-ul-Mukhtâr*, by Mohammed Amîn (the Syrian) who flourished under Amurath IV. The *Radd-ul-Muhtâr* is certainly esteemed now-a-days as the best authority on Hanafî Law. It contains a critical *resumé* of previous decisions, the opinions of the most important earlier legists, with a full account of the recognised and accepted principles in modern times. I have greatly utilised this work in the following pages. Another commentary on the *Durr-ul-Mukhtâr*, which I have also quoted in this book, is the *Tuhfat-ul-Akhiâr*.

The founder of the second school of law among the Sunnis was (Abû Abdullah) Mâlik ibn Ans, whose tenets are in force in Northern Africa, especially in Morocco and Algeria. He died in the year A. H. 179 during the reign of Hârûn ar-Rashîd. The best known writer on the tenets of this school was Sîdi Khalîl, whose encyclopædic work has been translated into French by M. Perron under the patronage of the French Government.

Shâfeï was the founder of the third school. He was born at Ghizah in Syria in the same year in which Abû Hanîfa died. He

[1] Called among the Indian Mahommedans, the *Shâmi* or *Syrian* on account of the author being a native of Damascus.

died in Egypt in the year A. H. 204 (A. C. 819) during the Caliphate of Al-Mâmun. He was a contemporary of the Shiah Imâm Ali ibn Musa ar-Reza. Shâfeï's doctrines are generally followed in Northern Africa, partially in Egypt, in Southern Arabia, in Java and the Malayan peninsula generally and among the Mussulmans of Ceylon. His followers are also to be found among the Borahs of the Bombay Presidency. Among the Shâfeï works of repute are the following :—

(1) The *Mukhtasar* of Abû Khoja :

(2) The *Takrîb* of Shams-uddin Abû Abdullah ibn Kâsim al-Ghazzi.

(3) The *Muharrar* of Abu'l Kâsim Abd-ul-Karîm ibn Mohammed ar-Râfî ; and

(4) The *Minhâj-ut-Talibîn* of Mohi-ud-din Abû Zakaria Yahya ibn Sharaf an-Nawâwi (who died in A. H. 676). This work has been recently published with a learned translation into French by M. Van Den Berg, under the authority of the Dutch Government.

It is a noticeable fact that Shâfeïsm is spreading among the Indian Mussulmans.

The fourth school was originated by Ibn Hanbal. He flourished during the reigns of al-Mâmûn and his successor Mutassim b'illâh. These two Caliphs were Mutazalas. Ibn Hanbal's extreme fanaticism, and the persistency with which he tried to inflame the bigotry of the masses against the sovereigns brought him into trouble with the rulers. He died in the odour of great sanctity in the year A. H. 241. Ibn Hanbal and his patristicism are responsible for the ill-success of Mâmûn in introducing the Mutazala doctrines throughout the empire ; and for the frequent outbursts of persecution which deluged the Mahommedan world with the blood of Moslems.

Abû Hanîfa, Mâlik, Shâfeï and Ibn Hanbal are the founders of the four orthodox schools among the Sunnis (the *Mazâhib-i-arbaa*). Their doctrines, as already stated, are essentially the same as regards the fundamental dogmas *(usûl,)* though they differ from each other in the application of private judgment and in the interpretation and exposition of the Koran.

Mâlik and Ibn Hanbal, almost entirely, exclude the exercise of private judgment in the exposition of legal principles. They are wholly governed by the force of precedents ; they do not admit the

validity of a recourse to analogical deductions, or of such an interpretation of the law whereby its spirit is adapted to the special circumstances of any particular case. Shâfeï less speculative than Abû Hanîfa is more enlightened than Mâlik and Ibn Hanbal. His followers, are however designated equally with the Mâlikis and Hanbalîs, *Ahl-ul-hadîs* (traditionists *par excellence*).[1]

The exercise of private judgment, consecrated by the Prophet and adhered to strictly by his immediate descendants, had induced the development of a liberal spirit among the Fatimides and this had its legitimate influence on the mind of Abû Hanîfa. The value which he and his early disciples attached to the exercise of *Kiyâs* is proved by a series of passages given in the *Fatâwa-i-Alamgiri*. The followers of Abû Hanîfa are styled *Ahl-ur-rai wa'l kiyâs* (people of judgment and reason).

Ibn Khaldûn, one of the greatest critical scholars and jurists among the Mussulmans, speaks thus of the latitude given to reason or analytical judgment by the followers of the several Sunni schools. "The science of jurisprudence forms two systems, that of the followers of private judgment and analogy (*Ahl-ur-rai wa'l kiyâs,*) who were natives of Irâk and that of the followers of tradition, who were natives of Hijâz. As the people of Irâk possessed but few traditions, they had recourse to analogical deductions and attained great proficiency therein, for which reason they were called the followers of private judgment; the Imâm Abû Hanîfa who was their chief, had acquired a perfect knowledge of this system and taught it to his disciples. The people of Hijâz had for Imâm, Mâlik ibn Ans and then Ash-Shâfeï. Some time after, a portion of learned men disapproved of analogical deductions, and rejected that mode of proceeding, these were the *Zâhiris* or *literalists* (followers of Abu Dâûd Sulaiman), and they laid it down as a principle that all points of law should be taken from the *Nusûs* (text of the Koran and traditions) and the *Ijmâa* (universal concordance of the ancient Imâms)."

The early Hanafî jurists declared in explicit terms the necessity for the exercise of private judgment in the exposition of the law and the administration of justice. And in this they approached closely the doctrines of the Usûli Shiahs.

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[1] See *The Spirit of Islâm*, p. 518.

Râzi-ud-Din Nishâpuri has declared in his *Muhît*, "If the concurrent opinion of the Companions be not found in any case, which their contemporaries may have agreed upon, the Kâzi must be guided by the latter. Should there be a difference of opinion betwen the contemporaries, let the Kâzi compare their arguments and adopt the judgment he deems preferable. If, however, none of the authorities referred to be forthcoming and the Kâzi be a person capable of analogical deduction *(Ijtihâd), he may consider in his own mind what is consonant with the principles of right and justice, and applying the result with a pure intention to the facts and circumstances of the case, let him pass judgment accordingly.*" Abû Bakr ibn Masûd al-Kâshâni has stated in the *Badâia*, "Where there is neither written law nor concurrence of opinions for the guidance of the Kâzi, if he be capable of legal disquisition and have formed a decisive judgment in the case, he should carry such judgment into effect by his sentence although other scientific lawyers may differ in opinion from him, for that which upon deliberate investigation appears to be right and just is accepted as such in the sight of God." And again, a third passage may be quoted to the same effect from the last mentioned work; "If in any case the Kâzi be perplexed by opposite proofs, let him reflect upon the case and determine as he shall judge right, or for greater certainty let him consult other able lawyers, and if they differ after weighing the arguments let him decide as appears just."[1] These dicta furnish the amplest reply to the absurd attacks which have often been levelled against Islâm, that it does not contain within it any elasticity or the germs of development, for its laws are stereotyped and cramped.

Unfortunately, the conception which has obtained a hold on the Sunni world, that *Ijtihâd*[2] or authoritative exposition of law by analogical deductions or the exercise of judgment, ceased in the third century of the Hegira, has exercised a most pernicious effect on the promotion and advancement of the Mahommedan communities governed by the Sunni doctrines. The modern Sunnis recog-

[1] *Fatâwa-i-Alamgiri*, III, p. 383.

[2] The word *Ijtihâd* signifies, in its most common acceptation, the striving to accomplish a thing, the making a great effort; but in speaking of a jurist it denotes the bringing into operation the whole capacity of forming a private judgment relative to a legal proposition.

nise three degrees of *Ijtihâd*.[1] The jurists of the first order are supposed to have possessed a total independence in the exposition of the law. They constituted, as it were, a connecting link between the Law and their own disciples, who had no right to question their exposition of the Koran, the *Sunnat* and the *Ijmâa*, even when apparently at variance with those elements or sources of jurisprudence. The *Mujtahids* of this high degree flourished in the first three centuries of the Hegira, and as they fixed the law upon certain defined lines the exercise of private judgment soon ceased to be acknowledged.[2] Some later doctors, Az-Zâhiri and As-Suyûti, for instance, claimed the right, but public opinion having commenced to run in a channel made for it by authority rejected the claim advanced by them. Henceforth there is a complete subjugation of private judgment to blind precedent.

Those *Mujtahids*, who had arrived at the second degree of *Ijtihâd*, possessed the authority of solving questions not provided for by the authors of the chief sects, and were the immediate disciples of the acknowledged *Mujtahids* of the first class, who, in some instances, allowed their pupils to follow and teach opinions contrary to their own doctrines and occasionally even adopted their views.

Those who had attained the third degree of *Ijtihâd* were empowered to pronounce decisions upon their own proper authority in all cases not provided for by the founders of the sects or their disciples. Their decisions were, however, to be founded upon a comparison of the Koran, the *Sunnat* and the *Ijmâa*, taken conjointly with the opinions of the *Mujtahids* of the first and second classes, and they were not authorised to controvert their published doctrines either respecting the elements of the law or the principles derived therefrom. The *Mujtahids* of the third class were required to possess a perfect knowledge of all the branches of jurisprudence according to the doctrines of all the schools, and this class comprises a large number of doctors of greater or less celebrity, some of whom were raised to the rank during their lifetime, but the greater portion after their decease.[3]

As a title the term *Mujtahid* has long since fallen into disuse amongst the Sunnis.

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[1] D'Ohsson, I, p. 7.

[2] *Fatâwa-i-Kâzi Khân*, I, p. 1.

[3] See Note II at the end of the Introduction.

The present stationary condition of the Mahommedan nations, as compared with their rapid progress in the early centuries of Islâm, is due principally to this conception regarding *Ijtihâd*, and the general view that no person, who has not attained to that factitious eminence or empirical stage of juridical knowledge possessed by the *Mujtahids* of the first three centuries, can aspire to freedom of legislation or liberty of judgment.[1]

Among the Shiah communities, also, the same blight has fallen over the ideas of men by the introduction among the common folk of the *Akhbârî*, in preference to, or supersession of, the *Usûli* doctrines. The freedom of judgment allowed by the latter school gave ample scope to social progress and moral development.

The *Akhbârî* submits himself implicitly to the law as enunciated by its constituted expounder called in Shiah countries the *Mujtahid*, and rejects all liberty of thought or reason.

This suppression of the human mind has naturally given birth to that movement in Islâm, symptoms of which are perceptible on all sides and which are so full of the most hopeful auguries for the future of the Moslem world. Shâfeïsm seems to have shaken off its ancient fetters, and now stands forth in the presence of the Sunnis as the embodiment of those aspirations for moral regeneration and legal reform which are agitating so many minds in Islâm. In India, under the name of *Rafua-edduinism*, it is measuring strength with Hanafism in its very strongholds; whilst Mutazalaism is spreading rapidly amongst the younger minds.

Among the Shiah jurists the following are the most eminent:—(1) Sheikh Mohammed ibn Mohammed ibn an-Numân Abû Abdallah, who was surnamed al-Mufîd, because of his numerous pupils; b. in A. H. 333 or 338, d. in 413; (2) Sheikh Mohammed al-Hassan ibn Ali Abû Jaafar at-Tûsi, surnamed the Sheikh of the Imamite faith, (A. H. 385—460). He was the most distinguished disciple of Sheikh Mufîd, and has left numerous works, which are regarded as authoritative and binding wherever the Shiah doctrines are followed; among others the *Istibsâr*, the *Khilâf wa'l wifâk*, ("concordances and divergences,") the *Nihâya fi bahr ul fikh wâ'l ferâyè*, and lastly the *Mabsût*, the most important and most erudite of all and on which

[1] On this point see my *Life and Teachings of Mohammed, or the Spirit of Islâm*, pp. 284—289.

there exist no less than eighty commentaries and glosses. He was an enlightened and liberal-minded lawyer and his views are far in advance of many of his successors. (3) Sheikh Syed Murteza Abu'l Kâsim Ali ibn Abi Ahmed al-Hussaini, a descendant of the Prophet surnamed "al-Huda" ("the guide to the way of salvation"). He was also a pupil of Sheikh Mufid and was one of the most prominent lawyers of his times. His views, which are decidedly more in conformity with modern thought and the requirements of an advancing civilisation, are chiefly in force among the Usûlis. One of his works which I have utilised in the compilation of the following pages is the *Kitâb ul-Intisâr*.

Unfortunately, the narrow conceptions of Sheikh Najm-ud-din Abu'l Kâsim Jaafar Abû Ali Yahyâ, surnamed al-Mohakkik have gained ground among the Akhbârî Shiahs and stopped all growth. This doctor was born at Hilleh on the Euphrates in the year 602 of the Hegira. Al-Mohakkik exercised his magisterial and professorial functions until 676, at which time he died of a fall from the terrace of his house. He was buried at Najaf, near the tomb of the Caliph Ali. He is the author of the *An-Nâfi*, of several commentaries on the *Nihâya* of Sheikh Tusî, and of the well-known work called the *Sharâya-ul-Islâm fi-massâil ul-halâl wa'l harâm*, ("the Mussulman Law regarding what is lawful and what is unlawful,") which has been paraphrased by Baillie and translated by Querry.

This work is divided into four parts: the first treats of religious duties; the second of contracts and synallagmatic obligations; the third, of unilateral acts, and the fourth comprises the prescripts relating to hunting, food, &c., and treats of the penalty applicable to crimes and delinquencies, from the point of view of canonical as well as civil law. It is hardly possible to exaggerate the baleful influence of this legist among the Shiah communities which have adopted his views. His literal views, which have paralyzed all movement of the intellect, are chiefly in force among the Akhbârîs.

There are several commentaries of the *Sharâya* in existence. Among these the *Masâlik-ul Afhâm* by Zain-ud-din Ali as-Sâili commonly called the Shahîd-i-Sâni, (second martyr,) and the *Jawâhir-ul-Kalâm* by Shaikh Mohammed Hassan an-Najafi are by far the most copious and erudite. This latter work though called a

commentary on the *Sharâya* of al-Mohakkik discusses legal questions from an independent basis, gives the dicta of other jurists and displays a critical spirit combined with a breadth of view and freedom of thought which would bear comparison with the best European writers. It also gives references to the opinions of the Caliph Ali and his immediate descendants.

Among other legal works of note are the *Sarâir* of Abi'l Makârim Mohammed ibn Idris al-Hilli, the *Ghunia* of ibn Zuhrâ, the *Maknaa* and *Hedâya* of Abu Jaafar as-Sadûk, the *Nâsiria* of Shaikh Syed Murteza, the *Talkhîs-ul-Marâm*, the *Ghâyat-ul-Ahkâm* and the *Tahrîr-ul-Ahkâm* by Shaikh Allâmah Jamâl-uddin Hassan ibn Yusuf ibn al-Murteza al-Hilli. His *Irshâd-ul-Azhân* is also a work of great merit and learning and is quoted as an authority under the name of the *Irshâd-i-Allâmah*.

The *Jâmaa-i-Abbâsi* is a concise and comprehensive treatise on Shiah Law, in twenty books or chapters. It is generally considered to be the work of Bahâ-ud-din Mohammed Aamili, who died in A. H. 1031 (A. C. 1621).

The *Mafatîh* by Mohammed ibn Murteza surnamed Muhsan, and the commentary on it by his nephew who was of the same name, but surnamed Hâdî, are modern works deserving of notice.

The *Rouzat-ul-Ahkâm*, written by the third *Mujtahid* of Oudh, consists of four chapters. The first chapter deals with the law of inheritance, most fully and perspicuously. All these works belong to the Akhbârî school.

Another work of great merit is the *Jâmaa-ush-Shittât*, which is a grand collection of decisions and dicta published within the last century in Persia by the leading *Mujtahids* of Teheran.

In the compilation of the following pages I have made use of chiefly, the *Mabsût*, the *Nihâya* and the *Istibsâr* of Imâm Jaafar Tûsi; the *Intisâr* of Sheikh Syed Murteza and the *Hedâya* of as-Sadûk, the *Sarâir*, the *Ghunia*, the *Sharâya*, the *Jawâhir-ul-Kalâm*, the *Jâmaa-ush-Shittât* and the *Sirat-un-Nijât* of Sheikh Abu'l Hassan, chief mujtahid of Teheran.[1]

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[1] Besides the works Sunni and Shiah, to which I have referred in the Introduction, I have utilised a number of others which are mentioned in the Appendix I.

NOTE I.

The following passage from Mr. Justice Arnold's judgment in the great Khoja case may, I think, prove of some interest to the students of the history of Mahommedanism :—

"The general expectation of Islám had been that Ali, the first disciple, the beloved companion of the Apostle of God, the husband of his only surviving child Fatimá, would be the first Caliph. It was not so to be. The influence of Ayesha, the young and favourite wife of Mahomet, a rancorous enemy of Fatimá and of Ali, procured the election of her own father Abubekr; to Abubekr succeeded Omar, and to him Osman; upon whose death, in the year 665 of our era, Ali was at last raised to the caliphate. He was not even then unopposed; aided by Ayesha, Moawiyah, of the family of the Ommeiades, contested the caliphate with him, and while the strife was still doubtful, in the year A.D. 660, Ali was slain by a Kharegite, or Mussulman fanatic, in the mosque of *Cufa*, at that time the principal Mahomedan city on the right or west bank of the Euphrates, itself long since a ruin, at no great distance from the ruins of Babylon."

"This assassination of Ali caused a profound sensation in the Mahommedan world. He was, and deserved to be, deeply beloved, being clearly and beyond comparison the most heroic of that time fertile in heroes—a man brave and wise, and magnanimous and just, and self-denying in a degree hardly exceeded by any character in history. He was, besides, the husband of the only and beloved child of the Apostle of God, and their two sons Hassan and Hussain had been the darlings of their grandfather, who had publicly given them the title of 'the foremost among the youth of paradise.'"

"Of these sons, Hassan, the elder, a saint and a recluse, on the death of his father sold his birthright of empire to Moawiyah for a large annual revenue which during the remainder of his life he expended in works of charity and religion at Medina. In the year A.D. 669, this devout and blameless grandson of the Apostle of God was poisoned by one of his wives, who had been bribed to that wickedness by Yezid, the son of Moawiyah and the second of the Ommeiad Caliphs of Damascus."

"There thus remained, as head of the direct lineage of the Apostle of God, Hussain, the younger son of Fatimá and Ali, a brave and noble man, in whom dwelt much of the spirit of his father."

"Eleven years after his elder brother's murder in the year 680 of our era, yielding to the repeated entreaties of the chief Moslem people of Irak Arabi (or Mesopotamia), who promised to meet him with a host of armed supporters, Hussain set forth from Medina to Cufa to assert his right to the caliphate against the hated Ommeiades. He crossed the desert with only a feeble train,—his wife, his sister Fatimá, two of his sons, and a few armed horsemen, when on reaching Kerbela, then a desert station about a day's journey from the west

bank of the Euphrates and in the near neighbourhood of Cufa, he found drawn up to meet him a host, not of retainers, but of foes. The narrative of what follows is among the most pathetic in all history. The noble son of Ali and Fatimá, the favourite grandson of the Apostle of God, after deeds of valour romantic even in an Arab of that age, fell pierced through and through with the arrows and javelins of the cowardly assailants who did not dare to come within the sweep of his arm. One of his sons and nephew had already been slain in his sight. His other son, his wife, and his sister were carried away captive to Damascus. They smote off the head of the son of Ali, and paraded it in triúmph through the streets of Cufa. As it passed along, the brutal Obeidullah, the governor of the city, struck the mouth of the dead man with his staff. 'Ah,' cried an aged Mussulman whom horror and just wrath made bold, 'What a foul deed is that!—on those lips I have seen the lips of the Apostle of God.' This tragic event stirred the heart of Islám to its very depth."

NOTE II.

D'Ohsson, following Ibrahim Halebi the author of the *Multaka*, classifies the Sunni jurists into seven ranks. In the first rank he places the four principal Imâms; with reference to the others the classification is as follows:—

Seconde Classe.

Elle comprend un trés grand nombre de docteurs, dont less plus estimès sons *l'Imam Ebn Youssouph*, *l'Imam Mahammed*, *l'Imam Zufér*, *l'Imam Mezny et l'Imam Buweyly*. Ils sont presque tous disciples de *l'Imam Azam*, dont ils suivirent lésprit dans l'explication des differéns points de morale et de partique, à la éserve de quelques-uns, sur lesquels ils debitèrent des opinions opposées; une partie de ces variantes fut même adoptée par les juristes postérieurs, dans leurs codes de jurisprudence, ainsi qu'il sera expliqué plus bas.

Troisieme Classe.

Les docteurs les plus notables de cette classe sont les *Imams Khassaf*, *Tahhawy*, *Hassan-Kerkehy*, *Schems'-ul-Eymet' ul-hœulcany*, *Es-Serakh'sy*, *Fakhr' ul Islam*, *Pezd-wy*, *Fakhr'ud-dinn*, et *Cazi-Khaun*. Ils sont tous partisans et observateurs fidéles de ce qui a été genéralement établi et statué par les *Imams* de la premiére classe, et expliqué par ceux de la seconde.

Ils n'ont fait qu'éclaircir et résoudre plusieurs questions omises jusqu'alors en les développant d'après l'esprit et les décisions des quatre premiers *Imams*. Ainsi cette classe de docteurs, n'ayant rien donné de son propre fond, est, par cela mêrvie, désignée sous le nom de *tabaka-sufla*, qui signifie classe inferieure.

Quatrieme Classe.

On y distingue, entre autres, *Korkky*, *Razy el Asshab'y*. Ils portent la dénomination particulière *Asshab-takhridjh*, pour désiguer que ces juristes se sont bornés, d'un côté, á donner de l'extension aux points déja expliqués et éclaircis par les *Imams* des trois premiéres classes, et de l'autre, á en tirer des conséquences absolument dans le même esprit.

Cinquieme Classe.

Les *Imams* les plus distingués de cette classe, sont *Eby-Hassan-Coudoury* et *Sarkhi-Hidayé*. On les appelle *Asshab'y-Terdjehh*, parce que leur principal

mérite est d'avoir compulsé les ouvrages des précédens *Imams*, discuté leurs variantes, et fixé, par leur choix, celles qui devoient avoir la préférence.

Sixieme Classe.

Sahhib-Kenz, *Sahhib ul-Mukhtar*, *Sahhib-ul-Medjhmâ* et *Sahhib-Wikayé*, sont les plus estimés de ces docteurs. Tout leur travail se réduit á exposer leur opinion particuliére sur le mérite des œuvres et des decisions canoniques des *Imams* de la quatriéme et cinquième classe.

Septieme Classe.

Elle contient tous les *Imams* postérieurs qui ont écrit sur le culte comme sur la jurisprudence, d'aprés l'esprit et l'opinion de ceux des six autres classes. Tels sont les fameux ouvrages de *Tatar-Khaniyé*, de *Hindiyé*, d' *Eb'ul Léyss*, de *Medjhma-ul-Bahh-reyn*, d'*Ebul-Cassim*, de *Kirahiyetk'ul-Fetawa*, &c. &c. On donne généralement á tous ces écrites le nomme de *Mutawalath*, parce qu'ils sont trés-volumineux, et qu'ils traitent fort au long de toutes les matiéres relatives á ces lois canoniques.

Cette derniere classe est censée comprende aussi tous les docteurs et tous le jurisconsultes qui étudient la science du droit, comme sont, dit le même auteur lés *Oulemas* de nos jours, décorés, á l'égal des anciens *Imams*, des titres de *Meschaykh*, de *Foukahha*, et d'*Oulema* c'est-á-dire anciens, juristes, docteurs; mais jamais de celui de *Mudjhtehhid* ou interprètes sacrés.

NOTE III.

In the Islâmic system the different schools and sub-schools are so intimately connected, with the different persuasions, sects or communions to which they appertain, that when a person belonging to one communion or sect or sub-sect goes over to another, his status and the dispositions made by him, as well as the succession to his inheritance, are thenceforward governed by the rules of the school to which he now belongs. For example, a Shiah on adopting the Sunni persuasion would subject himself to the Sunni Law. So a Hanafi becoming a Shâfeïte or an Akhbârî becoming an Usûli would be governed by the Shâfeï or Usûli principles as the case may be.

CHAPTER I.

THE LAW RELATING TO GIFTS.

SECTION I.

GENERAL OBSERVATIONS.

UNDER the Mahommedan Law, there is no distinction between ancestral and self-acquired property; and the rights of the owner are absolute over both during lifetime. He may dispose of it in whatever way he likes. But such dispositions, in order to be valid and effective, are required to have operation given to them during the lifetime of the owner. If a gift be made, the subject-matter of the gift must be made over, actually or constructively, to the donee at the time; the donor must in fact divest himself of all proprietary rights in it, and place the donee so far as practicable in possession thereof. The power of testamentary disposition, as will be shown afterwards, is restricted to a third.

This restriction on the disposing powers of a Mahommedan is referred to in the following terms by the Privy Council in the case of *Rani Khujoor-unnissa* v. *Mussamut Roushan Jehan*:[1]

Rani Khujoor-unnissa v. Mussamut Roushan Jehan.

"The policy of the Mahommedan Law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons provided he complies with certain forms."

This restriction, which is not without analogy in certain European systems,[2] is surrounded with conditions which require great attention in the study of Mussulman Law.

[1] L. R., 3 Ind. App., p. 307.

[2] See Peterson's English and Scotch Law (1860) pp. 223—224.

Dispositions of property divide themselves under two heads, *viz.* :—

(1) Dispositions *inter vivos.*

(2) Dispositions which are in their nature testamentary, and which are not intended to operate until after the death of the person disposing.

A disposition, however, made at a time when the disposer was suffering from a disease, which is technically called death-illness *(Marz-ul-mout,)* is treated as a testamentary disposition. But we shall discuss this in detail in due course.

The dispositions *inter vivos* with which we have principally to concern ourselves are *Wakf* and *Hiba.*

Hiba. (*a*) A *Hiba* is the voluntary transfer, without consideration, of some specific property (whether existing in substance or as a *chose in action*). This definition will be more fully explained later.[1]

Wakf. (*b*) A *Wakf* is the settlement in perpetuity of the usufruct of any property for the benefit of individuals or for a religious or charitable purpose. In the Sunni Law, the grant of the usufruct for a limited time, without consideration and resumable at will, is called an *aâriat (commodatum).*[2] The distinction between *Hiba* and *aâriat,* between the gift of the *corpus* or substance of a thing, and of the mere income for a limited time, was discussed at considerable length by the learned Subordinate Judge of Allyghur in the case of *Mahommed Faiz Ahmad Khan* v. *Ghulam Ahmad Khan,*[3] whose judgment was subsequently affirmed and adopted by both the High Court and the Privy Council. The judgment is so exhaustive and thorough, that I cannot do better than transcribe a portion to illustrate my meaning :—

Mahommed Faiz Ahmad Khan v. Ghulam Ahmad Khan.

Adriat. "To make a person the owner of the substance of a thing without consideration is a *hiba* (gift), while to make him the owner of the profits only without consideration is an *ariat* or *commodatum, (vide Durr-ul-Mukhtar, Kitab-ul-hiba).* In a gift, it is essential that the donor should be sane, owner and of age, that the thing

[1] In the Transfer of Property Act, a gift is defined thus :—"Gift is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person called the donor, to another, called the donee and accepted by or on behalf of the donee. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void."

[2] For the Shiah rule, see *post.* [3] I L., 3 All., 490.

given be not undivided *(mushaa)* and in possession of the donor, and that there be proposal and acceptance. A gift is not void for invalid conditions ; on the contrary, the conditions are void.

"For example, if a slave be made a gift of, with the condition that the donee should set him free, the condition is void but the gift is valid *(Durr-ul-Mukhtar, Kitab-ul-hiba)*. In an *ariat*, it is not necessary that the donor should be of age, nor that the thing given should be undivided, nor is acceptance after proposal a condition, *(Alamgiri)*. In the *Imadia*, it is explained that the *ariat* of a joint property is valid and so are its deposit and sale, *(Durr-ul-Mukhtar, Kitab-ul-ariat)*. The words by which an *ariat* is constituted have a special chapter assigned to them in the *Alamgiri*, and I shall copy it in this place to shew what words are used in giving a thing in *ariat* and of what signification ; (Second Chapter *Kitab-ul-ariat, Alamgiri.*) If he said, 'I have made thee owner of the profits of this house for a month ;' or, without saying a month, 'without a consideration,' it will be an *ariat*. This is in the *Fatawa* of Kâzi Khan. And it is valid by the words :—'I lent thee this robe, thou mayest wear it for a day,' or 'I lent thee this house, thou mayest live therein for a year ;' (*Tatarkhania*). If he said, 'I make this house of mine thy residence for one month' or, if he said, 'thy residence for my lifetime,' this will be an *ariat ;* (this is in the *Zahiria*). And if he said, 'I made thee be borne on her for God's sake,' it is an *ariat ; (Fatawa Kâzi Khan)*. And if he said, 'my house is for thee a gift by way of residence,' or 'a residence by way of gift,' it is an *ariat ;* this is so in the *Hedaya*. And if he said, 'my house is for thee given by way of a residence,' or 'a residence by way of *Sadkah* (alms)' or 'a *Sadkah* by way of *ariat*,' or 'a loan (*ariat*) by way of gift,' all this is *ariat ;* this is so in the *Kafi*. And if he said, 'my house is for thee, if thou survivest me, and for me if I survive thee,' or 'for thee a *wakf*,' it is an *ariat* according to Abû Hanîfa and Mohammed, but a gift according to Abû Yusuf, and the words '*rakba*' and '*habas*' are void ; this is so in *Badaia*. If he said, 'my house is for thee, if thou outlivest me, and for me, if I outlive thee,' or 'a *wakf* for thee,' it will be an *ariat* according to all ; this is so in *Yanabia*. 'I made over this ass to thee so that thou mayest use it and feed him with grass at thy own cost,' this will be an *ariat*. This is so in *Kunia*. If he said,

'I have given thee this tree for eating the fruit thereof' it is an *ariat*, unless he intends a gift by it. This is so in *Tamar Tashi*.

"These are the words from which an *ariat* is construed, and it will also appear from looking at all of them that the word "*wahabto*" (I made a gift) is not found anywhere among them. The words "*hibatan suknah*" or "*suknah hibatan*" which are used above do not mean a gift of the substance of the thing. They are only an elucidation of '*dari laka*,' so that the meaning is that the house which is given is for residence. I shall now give those words which constitute a gift, and they are of three kinds :—First, those which are specially made (adapted) for a gift ; secondly, those which denote a gift, metaphorically or by implication ; and thirdly, those which import *hiba* or *ariat* equally. I copy the following from the *Alamgiri*, *Kitab-ul-hiba*, Chapter I. 'The words by which gift is made are of three kinds :—First, those which are specially adapted or made for *hiba ;* secondly, those which denote *hiba* by implication or metaphorically ; and thirdly, those which may import *hiba* or *ariat* equally. Of the first kind there are such as these :—'I made a gift of this thing to thee,' or 'I made thee owner of it,' or 'I made it for thee,' or 'this is for thee,' or 'I bestowed upon thee or gave thee this.' All this is *hiba*. Of the second description are such as these :—'I clothed thee in this garment,' or 'I gave thee this house for thy lifetime.' This is a gift. In the same way if he said 'this house is for thee for my age,' or 'for thy age or for my lifetime' or 'for thy lifetime, so that when thou art dead it will revert to me,' then the gift will be valid and the condition void. But the third kind are such as these :—Should he say 'this house is for thee,' or 'for me if I survive thee,' or 'a *wakf* for thee,' and make it over to him, it is an *ariat* according to the two, Abû Hanîfa and Mohammed, and a *hiba* (gift) according to Abû Yusuf. The above question shows that the word '*wahabto*,' the meaning of which is 'I made a gift of,' is a word specially adapted for gift (*hiba*), and is not used to denote a loan. And this is the word which has been used in the document entitled *hibanamah* (deed of gift). None of the doubtful words have been used in this document, and the words used after it are by way of advice (*mashwara*). There is an example in the law-books eminently applicable to the present case, which makes it clear that the transac-

tion in dispute was one of *hiba* and not of *ariat*. This example is to be found in all the books, in the *Hedaya*, in the *Durr-ul-Mukhtar*, and in the *Alamgiri*:—'*dari laka hibatan taskunahu*,'—'My house is for thee by way of gift that thou mayest live in it.' It is a rule in Arabic that a verb sentence is never used as explicative (*tafsir*) of a noun sentence '*dari laka hibatan*' is a noun sentence and '*taskunahu*' a verb sentence, ; '*taskunahu*' cannot therefore be explicative of the preceding sentence. On the contrary, the donor by way of advice, counsels the donee to live in it ; and the latter is free to adopt the counsel or not. Among the sentences by which a valid gift may be made the following appears in the law-books :— *Durr-ul-Mukhtar*, 'my house is for thee that thou mayest live in it.' Because the words 'that thou mayest live' (*taskunahu*) are an advice, and not an explanation, for a verb is not adapted to be explicative of a noun. So then he counsels him in the mode of his proprietorship by telling him to live in it. So if he likes, he can accept the advice, or he may not accept it. But if it be said, '*dari laka hibatan suknah*' or '*suknah hibatan*' as mentioned in the words used to describe an *ariat*, there '*hibatan suknah*' is a *tafsir* or explanation of ownership, contrary to '*dari laka hibatan taskunahu*' where it is not a *tafsir*. *Hedaya* :—If he said 'by way of gift that thou mayest live in it,' then it is a gift, for his saying '*taskunahu*,' that 'thou mayest live in it,' is an advice, and not an explanation and it is an index of the object, unlike his saying '*hibatan suknah*' for it is *tafsir* to it. In the deed of gift, the words 'made a gift of' and put her in possession, are followed by the direction that the sister-in-law may manage the villages and apply their income to meet her necessary expences and to pay the Government revenue, this is all by way of advice and the transaction of gift concluded with the preceding words. The words *hiba kiyá* '(made a gift of),' denote their real meaning and are made use of with reference to the villages. It is a rule in every language that a word is always understood to be used in its literal meaning, though of course when the literal meaning is not applicable the metaphorical one may be understood. It is not necessary to refer to Arabic books alone for further corroboration of this fact. The word gift is perfectly applicable in its literal sense in the document, where these words are used. The donor was not a minor, nor the subject of gift *mushaa* (undivided). There is no reason why the word *hiba* should be held

to mean an *ariat* (loan) and why, when it is clearly stated that the mouzas of Sahauli and Kamalabad are made a gift of, the context should be construed to mean that the profits of the mouzas Kamalabad and Sahauli were given as *ariat*. On a perusal of the whole document, it clearly appears that Faiz Ahmad Khan never even thought of effecting an *ariat*. He has used sufficient words by which nothing but a gift could be intended. The whole manner is that of a gift, and there is not even the trace of an *ariat*. The value of the property was fixed, the full stamp-duty was paid, and lest the property should be suspected to be *mushaa*, or undivided, and the gift vitiated on that account, he stated that 'both villages are owned by me without the partnership of any one else.' Then using the word '*hiba*,' he declared that he had made a gift and confirmed it, so far as to write that neither he nor his heirs shall have any claim. At the conclusion, he expressed the nature of the document by saying that he had written it by way of a deed of gift. He also stated in the document that he had made over the possession to the Mussamât which is the completion of the gift (but which is not necessary in an *ariat* or loan.) He made the Mussamât execute a document in the way of *kabuliat* (acceptance) which was necessary for the validity of the gift (not necessary in an *ariat*). After the conclusion of the words of the document and writing '*fakat*' (end) the words headed 'P. S. I promise' used by the defendant, further elucidated the nature of the gift and show that it was a *hiba-bil-ewaz* (gift for consideration). There is no reason why all the words should not be understood in their literal sense, and why the transaction should be considered as *ariat (commodatum)*, about which there is no word at all in the whole document. The transaction cannot be considered to be an *ariat*, unless all the words be construed in a sense other than literal: but for this there must be a very strong reason, which the Court thinks does not exist."[1] The result of the ruling of the Privy Council in this case appears to me to be this, that "where there is an absolute gift words describing its objects do not limit or cut down its operation."

[1] I have given this judgment *in extenso* to throw into strong relief, the distinction between *hiba* and *adriat* so clearly pointed out by the Subordinate Judge in this case.

Section II.

'Hiba' or Gift Simple.

Among Mahommedans, the law relating to the subject of *hiba* possesses special importance. The principle of exclusion which prevails in all the schools, and the absence of the right of representation, causes much hardship. For example, if a man has three sons, one of whom dies in the lifetime of his father leaving children, these children are excluded from the inheritance by their uncles. Females under the Mahommedan Law take smaller shares than sons. Under the Sunni Law especially, owing to the principle of agnacy *(taasib)* considerable injustice is frequently occasioned which it is often the endeavour of owners of property to avert in their lifetime. The children of a daughter are excluded from inheritance in favour of brother's sons. To remedy these evils, it has become frequent among Mahommedan families in India, as elsewhere, to have recourse to *hibas*, whereby it is not only endeavoured to correct any such injustice as I have indicated, but oftentimes to give a larger share to one heir than the other. The lawfulness of giving a larger share to one heir than the other by a disposition *inter vivos* is specially recognised in the *Alamgiri*. *Hiba* or gift simple.

"If a man in health making gifts to his children should desire to give to some of them more than to others, he may lawfully do so according to Abû Hanîfa, when the children in whose favour the distribution is made are superior to the others as regards religion, but when they are all equal in this respect it is abominable to make any distinction. According to Abû Yusuf, an unequal distribution may lawfully be made when there is no intention of injuring any of the children and as much should be given to a daughter as to a son. The *fatwa* is in accordance with this and it is approved. But if a man in health should give the whole of his property to one child it is lawful judicially, though he is sinful for so doing. And when a man has a profligate son he should give him no more than may suffice for his maintenance that he may not be aiding him in his wickedness. While if he has a son given to learning instead of business he may lawfully give more to him than to the rest."[1]

[1] *Fatâwa-i-Alamgiri*, IV, p. 545.

The frequency with which *Hibas* are made in India makes it necessary that we should examine carefully the provisions of the law on this subject.

Hiba is a voluntary gift[1] of property or the substance of a thing by one person to another so as to constitute the donee, the proprietor of the subject-matter of the gift. It requires for its validity three conditions: (1) a manifestation of the wish to give on the part of the donor; (2) the acceptance of the donee, either impliedly or expressly; and (3) the taking possession of the subject-matter of the gift by the donee, either actually or constructively.[2]

The Hanafî lawyers define *Hiba* as the conferring of a right of property in something specific without an exchange. Sîdi Khalîl (the Mâliki lawyer) defines it as an act of liberality by which the proprietor bestows a thing without the intention of receiving anything in exchange.[3] But the best definition of a *Hiba* is that given by the Shiah lawyers. They declare it to be an obligation (*akd*) by which the property in a specific object is transferred immediately and unconditionally without any exchange and free from any pious or religious purpose on the part of the donor.[4] A gift may be made verbally as by writing. The Transfer of Property Act leaves this provision of the Mahommedan Law untouched. And the Privy Council in the case of *Kamar-un-nissa Bibi* v. *Hussaini Bibi*[5] upheld a verbal gift when it appeared to be supported by all the circumstances.

Kamar-un-nissa Bibi v. *Hussaini Bibi.*

There is another species of donation in vogue among the Mussulmans, which is pious in its character and made in view of the future life. This is called *Sadkah*.[6] It takes its origin from the directions contained in the Koran, notably in Sura II, verse 211, "the goods that you give shall be known to God."

This species of gift is irrevocable according to all the schools, but we shall deal with it in the order in which it occurs. Technically the donor or grantor is called *Wâhib*, the donee *Mouhoob-alaih* and the subject-matter of the gift, *Mouhoob*.

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[1] That is, without consideration.

[2] *Nunda Sing* v. *Meer Jaffor Shah*, 1 Sel. Rep., 5.

[3] If an exchange is obtained, the character of the gift is changed.

[4] *Mabsût*; *Irshâd-ul-Azhân*: *Sharâya-ul-Islâm*, p. 241.

[5] I. L., 3 All., 206.

[6] Pious offerings made with the object thereof obtaining divine approbation.

The qualities necessary for making a valid *Hiba*, in other words, the capacity for making a donation, or what might be called a voluntary settlement, are the same as those required for the validity of any other contract. Every act which in the Mahommedan Law would be treated under the head of *tussarufât-i-shariyèh* (legal transactions) presupposes a certain amount of free volition. "Consent," as has been well-remarked, "is an act of reason accompanied with deliberation, the mind weighing as in a balance the good and evil on both sides." Every legal act under the Mahomedan Law is regarded as an *akd* or obligation, and the validity of every obligation depends on the faculty or capacity of the person doing the act to consider freely and rationally the consequences resulting therefrom. If the person is, by virtue of an inherent or superimposed and accidental disqualification, incapable of exercising his volition in a rational manner and with perfect reasoning, any obligation entered into by him is null and void. Capacity to make a *Hiba*.

The conditions, therefore, necessary for the validity of any disposition are the following :—

(1) Majority.
(2) Understanding.
(3) Freedom.
(4) Ownership of the subject-matter of the disposition.

Now these conditions are not restricted to gifts alone ; they apply to all dispositions of property.

Persons under the age of puberty are deemed infants (*saghir*), and are treated as having no capacity to bind themselves for want of sufficient reason and discernment of understanding. Minority under the Mahommedan Law ceases on the completion of the 15th year.[1] And, therefore, before the passing of Act IX of 1875, a Mahommedan who had attained the 15th year was qualified to make a valid disposition of his property. Since Act IX of 1875 has come into force, there are three ages of majority recognized by law. Section 3 of Act IX of 1875 saves the Mahommedan Law of majority in questions relating to marriage, dower and divorce. "In respect of all other acts, the age of majority for persons who are wards of Courts, or for whom a guardian has been appointed Minority.

[1] According to the general opinion, though as will be seen afterwards, some jurists have held the completion of the 18th year as the age of majority.

by a Court of Justice is 21, for others it is 18." In the first case, a person would not be able to make a gift under the Mahommedan Law unless he has completed his 21st year, and in the latter case his 18th year. Owing to this peculiarity in the Majority Act, serious difficulties might arise concerning the capacity of one and the same individual in respect of different acts. For example, though a person, on the completion of his 15th year, may enter into a contract of marriage for any dower, would he have the power of commuting the dower by a *bai-mukâsa*? Similarly, would a woman over 15, but under the age of majority fixed by the Act, have the power of making a gift of her dower or remitting it to her husband?

Obligations entered into by idiots, lunatics and other persons *non compotes mentis* are null and void; but when a person, afflicted by lunacy, has lucid intervals, any act committed during such interval would be valid, subject to certain restrictions.

Causes of inhibition.

"The causes of inhibition," says the *Hedâya*, "are three, *viz.*, infancy, slavery and *junûn* (insanity)."[1] Though the law-books use the term *junûn*, as the only cause of inhibition, it may safely be taken from the examples cited, that the classes of persons, around whom the law throws its safeguards, are not confined simply to the persons who are afflicted with lunacy, or insanity, in some form or other, but also to those who, from accidental circumstances, lose for the time being their power of understanding. Story has adopted the enumeration of Lord Coke of the different classes of persons who are deemed in law to be *non compotes mentis*, and this enumeration may be taken as a safe guide to the principle upon which the Mahommedan Law proceeds in holding the acts of persons not *âkil* as invalid in law.

Non compotes mentis.

"Lord Coke has enumerated four different classes of persons who are deemed in law to be *non-compotes mentis*. The first is an idiot or fool natural; the second is he who was of good and sound memory, and by the visitation of God has lost it; the third is a lunatic, *lunaticus qui gaudet lucidis intervallis* and sometimes is of a good and sound memory and sometimes *non compos mentis*; and the fourth is a *non compos mentis* by his own act, as a drunkard. In respect to the last class of persons, although it is regularly true, that drunken-

[1] *Hed*, III, (English translation,) p. 468.

ness doth not extenuate any act or offence committed by any person against the laws but it rather aggravates it, and he shall gain no privilege thereby, and although in strictness of law the drunkard has less ground to avoid his own acts and contracts than any other *non compos mentis*, yet Courts of Equity will relieve against acts done and contracts made by him, while under this temporary insanity, where they are procured by the fraud or imposition of the other party. For whatever may be the demerit of the drunkard himself, the other party has not the slightest ground to claim the protection of Courts of Equity against his own grossly immoral and fraudulent conduct."

"But to set aside any act or contract on account of drunkenness, it is not sufficient that the party is under undue excitement from liquor. It must rise to that degree which may be called excessive drunkenness, where the party is utterly deprived of the use of his reason and understanding; for in such a case, there can in no just sense be said to be a serious and deliberate consent on his part, and without this no contract or other act can or ought to be binding by the law of nature. If there be not that degree of excessive drunkenness, then Courts of Equity will not interfere at all, unless there has been some contrivance or management to draw the party into drink or some unfair advantage taken of his intoxication to obtain an unreasonable bargain or benefit from him. For in general, Courts of Equity as a matter of public policy, do not incline on the one hand to lend their assistance to a person who has obtained an agreement or deed from another in a state of intoxication, and on the other hand they are equally unwilling to assist the intoxicated party to get rid of his agreement or deed merely on the ground of his intoxication at the time. They will leave the parties to their ordinary remedies at law unless there is some fraudulent contrivance or some imposition practised." * * * Drunkenness.

"In regard to drunkenness, the writers upon natural and public law adopt it, as a general principle, that contracts made by persons in liquor, even though their drunkenness be voluntary, are utterly void, because they are incapable of any deliberate consent; in like manner, as persons who are insane or *non compotes mentis*. The rule is so laid down by Heineccius and Pufendorf. It is adopted by Pothier, one of the purest of jurists, as an axiom which requires no illustration. Heineccius in discussing the subject has made some

sensible observations. Either, says he, the drunkenness of the party entering into a contract is excessive, or moderate. If moderate, and it did not quite so much obscure his understanding as that he was ignorant with whom or for what he had contracted, the contract ought to bind him. But if his drunkenness was excessive, that could not fail to be perceived, and therefore the party dealing with him must have been engaged in a manifest fraud, or that at least he ought to impute it to his own fault, that he had dealt with a person in such a situation. The Scottish Law seems to have adopted this distinction, for by that law persons in a state of absolute drunkenness, and consequently deprived of reason, cannot bind themselves by any contract. But a lesser degree of drunkenness which only darkens reason has not the effect of annulling contracts."

Imbecility. "Closely allied to the foregoing are cases where a person although not positively *non compos*, or insane, is yet of such great weakness of mind as to be unable to guard himself against imposition or to resist importunity or undue influence. And it is quite immaterial from what cause such weakness arises, whether from temporary illness, general mental imbecility, the natural incapacity of early infancy, the infirmity of extreme old age, or those accidental depressions which result from sudden fear or constitutional despondency or overwhelming calamities. For it has been well remarked, that, although there is no direct proof that a man is *non compos* or delirious, yet if he is a man of weak understanding and is harassed and uneasy at the time, or if the deed is executed by him *in extremis*, or when he is a paralytic, it cannot be supposed that he had a mind adequate to the business which he was about, and he might be very easily imposed upon."[1] Mere imbecility or *safâhat* is no ground of inhibition.[2] The acts therefore of a person who, without being positively *non compos* or insane, is yet of a weak mind are valid, unless they are stamped with the indicia of fraud. In the consideration of cases falling under this head, it will be as well to bear in mind the words of Mr. Justice Story, as explaining the principles

[1] Story's *Equity Jurisprudence*, I, §§ 230—234.

[2] In the case of *Kamarunnissa Bibi* v. *Hussani Bibi*, I. L. R., 3 All., p. 206, the Judicial Committee of the Privy Council had to deal with a similar question, and they held on a review of all the circumstances that the donor was able to comprehend the transaction though apparently a person of weak intellect, and that the gift could not be impugned on that ground.

upon which the Courts of Chancery in England would avoid the acts of persons, who are suffering from such extreme weakness of mind as to be unable to guard themselves against imposition, or to resist importunity or undue influence.

Huriyet or freedom is another necessary condition for the validity of a contract. A bondsman labours equally under the inhibition which applies to the acts of infants and *non compotes mentis*. But there is this difference between the case of a bondsman and those suffering from insanity, that whereas the act of a bondsman may be ratified by his master as the act of an infant may in some cases be ratified by his guardian, the acts of a lunatic are absolutely null and void.[1] The reason of the inhibition upon the acts of the bondsman is given at great length in the *Hedâya*. *Huriyet.*

Since slavery, however, does not exist in British India, even in the mild form in which it is recognized under the Mahommedan Law, the question has little more than a mere antiquarian interest as throwing light upon a state of manners rapidly passing away, in the full light of modern civilization and owing to a more correct reading of the laws of the Arabian Prophet.

The incapacity resulting from bondage is attached to the status of the bondsman, who stands, in the eye of the law, in the position of a minor, and is not treated as *sui juris*. But temporary loss of liberty, or rather freedom of volition by the exercise of constraint, duress or undue influence, as it does not affect the status, is not a ground of inhibition, and consequently contracts entered into under undue influence or coercion are valid, if ratified by the person contracting after the constraint or undue influence has ceased. In the Mahommedan law-books a special chapter under the head of *Ikrâh* is devoted to the doctrines applicable to questions referred to in this place, but though some of the principles seem at first sight to fall much short of the rules recognized by the English Courts of Equity with reference to cases of undue influence, in general the principles are analogous.[2] The doctrine, that in order to avoid a contract entered into by a free, sane and adult person, on the ground of *Ikrâh* or compulsion, it must be shown that the "compeller" The doctrine of *Ikrâh* or compulsion.

[1] *Hedâya*, III, p. 473.

[2] Compare *De Montmorency* v. *Devereux*, 7 Cl. & Fin., p. 118. Compare the provisions of the Indian Contract Act (IX of 1872), §§ 14, 15 & 16.

was in a position to carry out any threat held out by him, and that the threat itself was such as would influence the conduct of a reasonable person, only represents in another form the rule of equity, that the undue influence was such as would give rise to the presumption, that it might *bona fide* stop the exercise of free volition on the part of the person affected thereby. Any circumstance which so entirely overcomes the free agency of the party and exposes him to a fraudulent advantage or imposition would justify the Kâzi to set aside the contract. "*Ikrâh* or compulsion," says the *Hedâya*,[1] "applies to a case where the compeller has it in his power to execute what he threatens whether he (the compeller) be the Sultan or any other person as a thief (for instance). The reason of this is that compulsion implies an act, which men exercise upon others, and in consequence of which the will of the other is set at naught at the same time that his power of action still remains. Now this characteristic does not exist unless the other (namely, the person compelled) be put in fear, and apprehend that if he do not perform what the compeller desires, the threatened evil will fall upon him, and this fear and apprehension cannot take place unless the compeller be possessed of power to carry his menace into execution; but provided this power does exist, it is of no importance whether it exist in the Sultan or in any other person. With respect to what is recorded from Abû Hanifa, that compulsion cannot proceed from any except the Sultan, the learned remark that this difference originates merely in the difference of times and not in any difference of argument, for in his time none possessed power except the Sultan, but afterwards changes took place with respect to the customs of mankind. It is to be observed that in the same manner as it is essential to the establishment of compulsion, that the compeller be able to carry his menace into execution, so likewise it is requisite that the person compelled be in fear that the thing threatened will actually take place, and this fear is not supposed, except it appear most probable to the person compelled, that the compeller will execute what he has threatened, so as to force and constrain him to the performance of the act which the compeller requires of him."

"A person forced into a contract may afterwards dissolve it.

[1] *Hedâya*, III, p. 452.

If a person exercise compulsion upon another by cutting, beating or imprisonment, with a view to make him sell his property, or purchase merchandise, or acknowledge a debt of one thousand dirhems to a particular person, or let his house to hire, and this other accordingly sell his property, purchase merchandise or so forth, he has it afterwards at his option either to adhere to the contract into which he has been so compelled, or to dissolve it and take back or restore the article purchased or sold, because one essential to the validity of any of these contracts is, that it have the consent of both parties which is not the case here as the compulsion by blows or other means rather occasions a dissent and the contract is therefore invalid, unless the means of compulsion be trifling. (This rule, however, does not hold where the compulsion consists only of a single blow or of imprisonment for a single day, since fear is not usually excited by this degree of beating or confinement.) Compulsion therefore is not established by a single blow or a single day's imprisonment, unless the compelled be a person of rank, to whom such a degree of beating or confinement would appear detrimental or disgraceful; for with respect to such a person compulsion is established by this degree of violence, as by it his volition is destroyed."

As in the English Law, compulsion is not confined, therefore, to actual duress or restraint or even threats. It extends to all class of cases where the person has no free will, but stands in *vinculo juris* in consequence of extreme terror or apprehension for himself or any other individual. Extreme necessity or distress, gross misapprehension as to the nature of the relationship between the contracting parties, circumvention or the influence of one mind over another, all come within the doctrine of compulsion. The Mahommedan Law contains no specific rules relating to the obligations imposed on persons standing in a fiduciary relationship to the donor, but generally the doctrines recognised by the English Courts of Equity are applicable to such cases. The Bombay High Court has gone so far as to hold a gift invalid which contravened the principles recognized by English Courts of Equity with regard to persons standing in a fiduciary relationship to the donor, though the donor, who was a Mahommedan lady, apparently possessed the capacity requisite under the Mahommedan Law to make a valid *Hiba*. And the same principle was enunciated and enforced by the Judicial

Tacoordeen Tewary v. Nawab Syed Alli Hussain Khan.

Committee of the Privy Council in the case of *Tacoordeen Tewary* v. *Nawab Syed Ali Hussain Khan*.[1]

Subject-matter of gift must be the property of the donor.

It is also a condition to the validity of a gift that the subject-matter should be the property of the donor, otherwise the gift is *ipso facto* void.

Insolvent donor.

Whether a person in insolvent circumstances, or extremely involved in debt, can make a voluntary settlement, is a question answered in two different ways by the Mâlikis and Hanafîs, though in the result the two schools seem to coincide.

Among the Mâlikis a person in insolvent circumstances or extremely involved مغرق is under an "inhibition" regarding any dealing of a gratuitous character with his property. A gift by a person so situated is, according to the Mâliki doctrines, void *ab initio*. According to the Hanafîs there is no such incapacity, but the Kâzi may avoid the act at the instance of the creditors if the gift was intended to defraud them. This principle is analogous to the rule of English Law according to which voluntary settlements in fraud of creditors are held to be voidable. The English cases under 13 Eliz. cap. VI, s. 6, which is reproduced in s. 53 of the Indian Transfer of Property Act, serve to illustrate the principle of the Hanafî Law.

Mere indebtedness or the fact that the donor was in embarrassed circumstances is not a sufficient ground for invalidating a voluntary settlement or for inferring a fraudulent intent, the real basis on which such gratuitous transfers can be avoided.[3] But it must be shown that there were unpaid debts *existing at the time* when the

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[1] L. R., 2 Ind. App., p. 192.

[2] See *Hedâya*, (III, Eng. translation,) p. 484.

[3] *Azimmunessa Begum* v. *Dale*, 6 Mad. H C. Rep., p. 468; Fulton's Reports, p. 154. In the former case Mr. Justice Bittleston says as follows:—"First, was the gift to the plaintiff altogether void as being in fraud of creditors. I will assume that according to Mahommedan Law it might be impeached on that ground, though the mere existence of debts due by the donor at the time of the gift would not be sufficient to establish such fraud [see p. 441 of App. to Mr. Sloan's Edn. of Macnaghten, citing a case from Morris' Cases S. D. A. Bom. Vol. II, p. 103]. At page 154 of Fulton's Reports, Sir L. Peel, in the case already referred to says, 'There is no evidence before us that the donor (who was a trader) was in debt at the time of making this gift, nor is there any evidence to show that he executed it in contemplation of insolvency, or with a view to defraud creditors,' but it is not to be inferred from these words that if he had been shown to be in debt, the gift would, on that account, have been held invalid."

gift was made, and the settlor was, if not necessarily insolvent, so largely indebted as to impel the Court to believe that the intention was to defraud persons who at the time of the transfer, were creditors of the donor.[1]

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[1] See the remarks of V. C. Wood in *Holmes* v. *Penny*, 3 K. & J., p. 90 ; also *Thompson* v. *Webster*, 4 Drew, p. 628 ; *Lush* v. *Wilkinson*, 5 Ves., p. 384 ; *Martyn* v. *Macnamara*, 4 D. & W., p. 427.

Story, I, § 367 ; *Dundas* v. *Dutens*, 1 Ves. Jr., p. 196.

Ramtonoo Mookerjea v. *Bibi Jeenut*, Fulton's Reports, p. 152 ; *Chunder Madhub Doss* v. *Ameer Ali* and others, 25 W. R., p. 119. In *Skarf* v. *Soulby*, 1 M. & G., p. 344, the bill alleged "that at the time of executing a voluntary settlement, the settlor was in insolvent or in embarrassed circumstances, or indebted to divers persons." It was held that "in the absence of any proof of actual insolvency, the mere fact of the settlor then owing some debts was not sufficient to invalidate the settlement." The judgment in *Bibi Jeenut's* case is too important not to be given *in extenso* :—

PEEL, C. J. :—"The passage cited from Macnaughten, p. 222, for the lessor of the plaintiff is not applicable, as that relates to a gift of money for money, and there possession is necessary. In this case, the lessor of the plaintiff claims under Jumeat Khan, and as such, is estopped by the recitals in this deed of gift, which is of a prior date. This is not a case in which the assignee is disputing the validity of the deed for the benefit of creditors. There is no doubt the deed is genuine, and as to the time of execution, no evidence having been given to the contrary, we must presume that it was executed at the time it purports to be dated. The deed has been proved in the usual manner by calling one of the attesting witnesses, and it was not necessary to go further. The *Kâzi*, however, before whose predecessor it was registered, in confirmation of this presumption, states that, in his opinion and from the practice of his office, the seal of the *Kâzi*, who registered the deed, was affixed about the time at which it is alleged to have been affixed. This, however, is merely in confirmation and strengthens the presumption. This deed then being of a prior date, the subsequent purchaser must impeach it for fraud ; all those grounds on which a deed is generally impeached are, however, wanting in this case. There is no evidence before us that the donor was in debt at the time of making this gift, nor is there any evidence to show that he executed it in contemplation of insolvency or with a view to defraud creditors. This, moreover, is not the case of a simple and voluntary gift, but of a gift for a consideration. The lessor of the plaintiff is in no better position than the donor. The prior conveyance or marriage settlement and recital of possession rendered are evidence against the donor, and so against the lessor of the plaintiff who comes in under him. The evidence thus clearly shows that possession was given, but none of the authorities even in cases of gift show that possession must be continuous, indeed it would be absurd to suppose the necessity of the husband's never occupying those premises which he has given to his wife. Now, though the validity of a gift depends upon the seisin, the validity of a sale is derived not from the seisin but from the

The extent of the indebtedness fatal to a voluntary conveyance as against *existing* creditors may shortly be stated as that from which it *must* be presumed that the intention of the donor was not to provide honestly for the donees, and to put the property out of his own reach, but to do so at the expense of the just claims against him. But the existence of property at the time of the settlement not included in it ample for the payments of debts then due would negative the fraudulent intention.[1]

Under the Mahommedan Law future creditors have no right to question a voluntary conveyance by a person *not* indebted at the time.

Settlements which are honest family arrangements are regarded with favour by Courts of Equity in England and are not within the statute of Elizabeth, although not founded on actual valuable consideration unless the right of existing creditors are thereby directly interfered with.[2] Among the Mahommedans of India, it is not infrequently the case for owners of property, with the object of preventing future disputes to make, during their lifetime, a division or distribution of their property. Such a disposition is in the nature of family arrangements and the deeds by which the dispositions are made are called *Tamlîknamahs* or *Taksîmnamahs*. Sometimes the donor reserves a small interest in the properties disposed of for his support and maintenance. Often the transferees, if likely to be the heirs of the donor, take smaller shares than they would in case of his dying intestate. Such dispositions, it is submitted, will be treated as settlements in the nature of family arrangements.

Under the Mahommedan Law, when there is consideration, however small, the character of the gift changes. It is not merely

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contract, and the passage cited from Macnaughten, p. 221, clearly shows that this deed must be construed according to the rules affecting the laws of sale. Under this gift, the wife may have a good title when the other donees would not from failure of consideration As the defendant has taken defence to the whole of the premises, and has only proved the title to a portion, the verdict must be for the lessor of the plaintiff, but execution will be limited to that portion of the premises not given to the wife in this deed of gift. We will, however, reserve liberty to Mr. Leith to move to enter a verdict for the lessor of the plaintiff for the whole, should he upon consideration think that by the principles of Mahommedan Law he is entitled to such a verdict."

[1] *Skarf* v. *Soulby*, 1 Mac. & G., p. 344; *Holloway* v *Millard*, 1 Mad., p. 114; *Kent* v. *Reilly*, L. R., 14, Eq, p. 190; *White* v. *Witt*, 24 W. R., p 727.

[2] *Penhall* v. *Elwin*, 1 Sm. & G., p. 258.

a *Hiba* or donation pure and simple, requiring some evidence of parting of title on the part of the donor; it is a transfer for a consideration, in which no delivery of possession is requisite. How far those transfers can be impeached by creditors on the ground of fraud we shall consider later.

A *bonâ fide* voluntary conveyance in which possession has been transferred is effective against a subsequent purchaser for value. 27 Eliz. cap. IV had no application in this country (beyond the Presidency Towns,) before the Transfer of Property Act. Section 53 of this Act, however, embodies the principle contained in 27 Eliz. cap. IV, but clause (*d*) of Section 2 expressly declares that, "nothing in the second chapter of this Act shall be deemed to affect any rule of Mahommedan Law."

A married woman is not debarred by the status of marriage from making any disposition during the subsistence of marriage. She can deal with her property as if she were a *femme sole*.[1]

Marz-ul-Mout.

Gifts by persons suffering from a mortal sickness are treated differently by the several schools. According to the Mâlikis such gifts are invalid. According to the *Jâmaa-ush-Shittât*, which is a work of great authority among the Shiahs, a gift made by a person suffering from a mortal illness which ends fatally, is valid with reference to the entire disposition, provided delivery takes place before the death of the donor, and provided the donor is in the perfect possession of his senses.

The principle is stated thus :—

"A man makes a gift in death-illness (*Marz-ul-Mout*) of all his property to another whilst in possession of his senses; is this gift valid with reference to the whole property or only to one-third? Is possession of the donee necessary for the validity of this gift? Is possession of only a portion valid with reference to the whole? If the donee takes possession of the subject-matter of the gift, locks it up in a case and leaves it with the donor, or in the case of a gift of a house, if the donor being sick lives in it, whilst the donee is in possession thereof, is his possession sufficient in law?" These involved questions are answered in this way :—"Yes, the gift is valid with reference to the entire property and is not restricted to a third;"

[1] In *Lutufunnissa* v. *Rajaoor Kahman*, 8 Weekly Reporter, p. 84, some question was raised on this point, but the learned Judges decided it rightly.

"Possession of the whole is necessary; without possession, it is not valid;"

"If the donor dies before possession, the gift is void, unless the donee is an infant and the donor is his guardian, for the possession of the guardian is tantamount to the possession of the minor and separate possession is not necessary. Possession of a portion is not effectual with reference to the whole;"

"If possession is actually taken of a moveable thing it is sufficient, though it may be left in the house of the donor. As regards a house, if it is sufficiently clear possession has been taken by the donee, the mere fact of the donor dwelling in it according to custom or owing to illness will not affect the validity of the gift."[1]

سوال

چه میفرمایند دراین مسئله که هر گاه شخصے در مرض الموت هبه و بخشش نماید کل مال خود را بشخصے در حال صحت عقل ایا این هبه معتبر و صحیح است از اصل مال یا از ثلث و ایا درلزوم این موهبه شرط است تصرف متهب در مال یانه بر فرض اشتراط ایا تصرف در بعض در حکم تصرف در کل است یا نه و هر گاه واهب موهوب را بتصرف متهب بدهد ومتهب اورا در اطاق واهب در دولابه گذاشته و کلیدان دولابه را خود متهب بر دارد ایا این را تصرف معتبر در شرع میگویند یا نه و هر گاه واهب یورتے را بمتهب هبه نموده باشد و رفع موانع از تصرف متهب نموده باین معنے که متهب دران یورت امد و شد کند و واهب مانع او نشود ولیکن واهب بجهته نا خوشي و بیماري دران یورت خوابیده باشد ایا این را تصرف متهب میگیرند یا نه *

جواب

بلے هبه صحیح است و اظهر است این که در تمام مال صحیح است و منحصر در ثلث نیست و تصرف و قبض در مطلق هبه شرط است و بدون ان لزومي ندارد و اگر قبل از اقباض بمیرد هبه باطل میشود مگر انکه متهب صغیر باشد و واهب ولي باشد که قبض ولی قبض صغیر است و ضرور بقبض علیحده نیست و قبض بعض در لزوم کل کافي نیست و در منقولات همان اخذ باید بخصوص باین نحو که در جاي مضبوط کند کافیست هر چند در خانه واهب

[1] *Jâmaa-ush-Shittât*, Chapter on *Hiba*.

باشد و هم چنین در اقباض یورت تخلیه با رفع مانع از تصرفات
کافیست هر گاه بقصد اقباض بوده و خوابیدن خود را درانجا مانع
از تخلیه نمیدانست و ظاهر اینست که هر گاه بگوید خانه از تو
و تصرف کن و بیا و برو لیکن من هم چند روزے در اینجا هستم چون
بیمارم یا انکه در عرف و عادت مضایقه از بودن ان دران مکان نمیشده
و میگفته اند که بتصرف او داده کافیست و شاید که این از باب
اقباض صندوق باشد باوجود انکه مطاع واهب دران باشد *

In the *Sharâya*, the principle is laid down thus—"When a person has made a gift being dangerously ill at the time, but afterwards recovers, the gift is valid. If, however, he should die of the disease, and the heirs refuse their assent to the gift, it is valid only to the extent of a third of his estate, according to the best traditional authority." But it is not stated what the effect would be, if the donor whilst alive put the donee in possession of the subject-matter of the gift. It seems to me that the principle is laid down correctly in the *Jâmaa-ush-Shittât*. If possession is given to the donee whilst the donor is alive, the gift takes effect as a whole; if not, it is subject to the rules governing testamentary dispositions. Should the heirs assent, it would take effect as to the entirety of the gift; otherwise it will come out of the third of the deceased's property; if the gift is not to an heir.

Under the Hanafî Law, gifts made *in extremis*, or at a time when the settlor or donor is suffering from a death-illness are valid with reference to one-third of his estate. The term "death-illness" or *Marz-ul-Mout* is explained thus in the *Fatâwa-i-Alamgiri*:—

"When a sick woman has given her dower to her husband, the gift is valid if she recovers from her illness, and even though she should die of that illness, yet if it were not a death-illness, the answer would be the same; but if it were a death-illness, the gift would not be valid without the sanction of the heirs. As to the definition of a death-illnes, it has been said, and this is approved for the *Fatwa*, that when the illness is such that it is highly probable that death will be the result, it is a death-illness whether she has taken to her bed or not. Abû Lais has said that it is a death-illness when a man cannot pray standing; *and we adopt this*. A sick woman having given her dower to her husband then died, whereupon Abû Jaafar said, that if at the time of the gift she were

ble to stand up for necessary occasions, and raise herself without assistance, she should be considered as one in health and the gift is valid. The most valid definition of death-illness is, that it is one which it is highly probable will issue fatally, whether in the case of a man it disables him from getting up for necessary avocations out of his house or not, such, as for instance, when he is a *fakih* or lawyer from going to the *masjid* or place of worship, and when he is a merchant from going to his shop, and whether in the case of a woman it does or does not disable her from necessary avocations within doors. *The lame, the paralytic, the consumptive, and a person having a withered or palsied hand, when the malady is of long continuance, and there is no immediate apprehension of death,* may make gifts of the whole of their property. But when a woman has been seized with the pains of labour, her acts in that state are valid only to a third of her property, unless she recovers when they become lawful to the full amount. If she should give her dower to her husband, while in labour and should die during the *nifas*, (or prescribed period for purification after child-birth,) the gift would not be valid."

The *Radd-ul-Muhtâr*, however, states the rule in the following way: "For *Marz-ul-Mout* there is a period of one year, and gifts made then are equivalent to bequests and will operate with reference to one-third, if possession was taken before the donor's death. If the donor die before giving over possession to the donee, then the bequest is null, for the gift of the *mariz* is a bequest, as Kâzi Khân and others have explained this fully."[1]

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[1] At another place occurs the following passage:—

و يبطل هبة مقعد و مفلوج واشل و مسلول - به علة السل و هو قرح فى الرئة - من كان ما لة ان طالت مدته سنة - و لم يخف موته منه و الا تطل و خيف موته - فمن ثلثة - لانها امراض مزمنة لا قاتلة قبل مرض الموت ان لا يخرج لحوائج نفسه و عليه اعتمد فى التجريد - بزازية - والمختار انه ما كان الغالب منه الموت وان لم يكن صاحب فرائض قهستاني عن هبة الذخيرة (قوله و هبة مقعد آلخ) المقعد بضم ففتح من لا يقدر على القيام و المفلوج من ذهب نصفه وبطل عن الحس والحركة والاشل من شلت يده - عنايه- (قوله به علة السل) هو اولى مما فى النهاية عن المغرب من ان المسلول من سلت خصيتاه لما قال الاتقاني انه لا يناسب هنا لانه

"Similarly, a sale (made in *Marz-ul-Mout*) takes effect with reference to a third. The gift of the sick has two aspects, one with *Marz-ul-Mout.*

بعد تطاول الزمان لايسمى مريضا اصلا (قوله ان طالت مدته سنة) هذا على ما قاله اصحابنا وبعضهم قالوا ان عد العرف تطاولا فتطاول و الا فلا قهستاني (قوله ولم يخف موته منه) هذه الجملة وقعت موضحة للجملة الشرطية حموي عن المفتاح ثم المراد من الخوف الغالب منه لانفس الخوف كفاية وفسر القهستاني عدم الخوف بان لا يزدان ما به وقتا فوقتا لانه اذا تقادم العهد صار طبعا من طباعة كالعمي والعرج و هذا لان المانع من التصرف مرض الموت وهو ما يكون سببا للموت غالبا وانما يكون كذلك اذا كان بحيث يزداد حالا فحالا الى ان يكون آخره الموت و اما اذا استحكم وصار بحيث لايزداد ولا يخاف منه الموت لا يكون سببا للموت كالعمي ونحوه ان لا يخاف منه ولهذا لا يشتغل بالتداوي زيلعي وغيره (قوله و الا تطل وخيف موته) عبارة القهستاني والا يكن واحد منهما بان لم تطل مدته بان مات قبل سنة او خيف موته بان يزداد ما به يوما فيوما ـ ومفهومه انه اذا لم تطل ولم يخف موته فهو من الثلث و يخالفه عبارة الزيلعي ونصها اي ان لم يتطاول يعتبر تصرفه من الثلث اذا كان صاحب فراش ومات منه في ايامه لانه في ابتدائه يخاف منه الموت ولم يبا يتداوي فيكون مرض الموت و ان صار صاحب فراش بعد التطاول فهو كمرض حادث حتى تعتبر تصرفاته من الثلث وهو الموافق لكلام الشارح و بقي ما اذا طال و خيف موته و مقتضى عبارة القهستاني انه من الثلث ايضا و هوالمفهوم من تقييد المصنف ما يكون من كل المال بقوله ولم يخف موته (قوله لانها امراض مزمنة) اي طويلة الزمان وهو تعليل لقوله من كل ما له فكان ينبغي ذكره قبل قوله و الا الخ قال في المنح و في الفصول العمادية واما المقعد والمفلوج قال في الكتاب ان لم يكن قديما فهو بمنزلة المريض وان كان قديما فهو بمنزلة الصحيح لان هذه علة مزمنة و ليست بقاتلة (قوله وعليه اعتمد في التجريد) و في المعراج و سئل صاحب المنظومة عن حد مرض الموت فقال كثرت فيه اقوال المشائخ و اعتمدنا على ذلك على قول الفضلي و هو ان لا يقدر ان يذهب في حوائج نفسه خارج الدار والمرأة لحاجتها داخل الدار لصعود السطح ونحوه و هذا الذي جرى عليه في باب طلاق المريض وصححه الزيلعي اقول الظاهر انه مقيد بغير الامراض المزمنة التي طالت ولم يخف منها الموت كالفالج ونحوه و ان

regard to its operation as a bequest, and the other with regard to the delivery of possession as a gift. In bequest, the righ of property vests after death; but in gift the property vests immediately."

"When a sick person makes a gift," says the *Fatâwa-i-Alamgiri*, "it does not operate beyond one-third, anything beyond a third must be returned by the donee. And this applies to the vendor in a sale."

It has been held that a deed of gift executed at a time when the grantor was about dying cannot operate save as a will, and if made in favour of one who is an heir, it is inoperative without the consent of the other heirs.[1]

Under the Hanafi Law, the term *Marz-ul-Mout* is applicable not only to diseases which actually cause death, but to diseases from which it is probable that death will ensue, so as to engender in the person affected with the disease an apprehension of death.

But it has been held by the Allahabad High Court, that where the malady is of long continuance, and there is no immediate apprehension of death, a sick person may make a gift of his entire property.[2] A malady of long continuance is an illness which has lasted for a year, and there is no immediate apprehension of death.[3]

Labbi Bibee v. Bibbun Bibee.

In the case of *Labbi Bibee* v. *Bibbun Bibee*,[4] the Allahabad High Court held that, according to Mahommedan Law, a gift by a sick person is not invalid, if at the time of such gift his sickness is of long continuance, *i.e.*, has lasted for a year, and he is in full possession of his senses, and there is no immediate apprehension of his death. The result of this decision, is that a gift is not invalid, where, at the time of the gift the donor had suffered from a certain illness

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مغرورة اذا فرش ومنعته عن الذهاب في حوائجه فلا يخف ما جري عليه اصحاب المتون والشروح هذا تامل (قوله والمختار الخ) كذا اختاره صاحب الهداية في كتابه التجنيس—

[1] Sutherland's Weekly Reporter (B), p. 17.

[2] This seems to be in accordance with the principle stated in the *Jâmaa-ush-Shuttât*, which looks to the effect of the illness from which a man is suffering, upon his mind.

[3] *Muhammad Gulshare Khan* v *Mariam Begum*, I. L. R., 8 All., 781.

[4] 6 N.-W. P. High Court Repts., p 159.

for more than a year, and was in full possession of his senses, and there was no immediate apprehension of his death, though he died shortly after making the gift, but whether from such sickness or from some other cause it was not possible to say.

It would follow that a person labouring under a mortal illness cannot make a valid gift of the whole of his property, until a year has elapsed from the time he was first attacked by it. When a gift is made by a person labouring under such a disease, it is good to the extent of one-third of his estate, if the donee is not an heir. If the donee is an heir the gift is not valid without the assent of the other heirs.[1]

In the case of *Ghulam Mustafa* v. *Hurmut*,[2] the same Court held that the provisions of the Mahommedan Law applicable to gifts, made by persons labouring under a fatal disease, do not apply to a so-called gift, made in lieu of a dower-debt, which is really in the nature of a sale. *Ghulam Mustafa Hurmut.*

But this view seems to be in conflict with the Mahommedan Law which declares that even a sale by a person labouring under a fatal illness is valid only to the extent of one-third of his estate.

As regards the capacity of a mandatory (*vakil*) to make a valid *hiba* on behalf of his principal, his powers are conterminous with those of the latter. A husband is not generally speaking the mandatory of his wife.

SECTION III.

THE MOUHUB-LAHU OR DONEE.

Any person may receive a gift, without distinction of sex, or age, or creed, but under the Hanafi Law the donee must be legally in existence at the time of the gift. A gift therefore to an unborn person, one not *in esse*, either actually or presumably, is invalid. A gift, however, to a child *en ventre sa mère* is valid, if the child is born within six months from the date of the gift, because in that case it is presumed that the child was actually existing as a distinct entity in the womb of its mother. It is different, however, The *Mouhûb-lahû* or Donee.

[1] As regards *Marz-ul-Mout* gifts, see the cases in 1 Weekly Rep., pp 17 and 152, and in Weekly Rep., 1864, 220; 8 Weekly Rep., p. 84, and I L., 9 All., 357.

[2] I. L. R., 2 All., p. 854, *per* Pearson and Oldfield, JJ.

under the Shiah Law, where an estate may be devised to an unborn person if the commencement is made with a person in *esse*.

If a gift is made to *A* for life—under the Hanafî Law, the gift would take effect as an absolute gift; but under the Shiah Law, *A* would take a life-estate, and upon *A's* death the property would revert to the donor or his heirs. If the gift is to *A* for life and then to *B* for life, under the Shiah Law, both the life-estates would take effect, and upon the death of *B*, the property would revert to the donor or his heirs. A gift to *A* for life and then to *B* and his descendants would give a life-estate to *A* and an estate in fee to *B*.[1] Under both the systems, a gift to *A* and his children or descendants generally, or to his descendants "line after line," or any gift coupled with such terms as necessarily imply that the property is bestowed without any limitation, would take effect as an absolute gift to *A*.

The Mouhub.—The subject-matter of the gift.

The *Mouhûb*.

Anything over which dominion or the right of property may be exercised, or anything which can be reduced into possession or which exists as a specific entity or as an enforcible right, or anything, in fact, which comes within the meaning of the word *mâl*, may form the subject of gift. *Choses in action* and incorporeal rights may form the subject of gift equally with corporeal property. "A debt," says the *Kifâya*, "considered with reference to the prospect of payment is *mâl* or corporeal property, (so much so that *zakât* is obligatory on it); and it is susceptible of *tamlîk*. Considered with reference to its present state, it is a *wasf* or a *quality*, i.e., indebtedness, and is susceptible of *iskât* or extinction. Hence, a gift of it to the debtor which is an extinction is valid both by analogy and on a liberal interpretation (of the law), but a gift of it to another which is *tamlîk* (transfer of property) is valid on the latter ground."[2] The argument

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[1] *Jawâhir-ul-Kalâm*. See *post*, pp. 139,140

[2] *Kifâya* (published with the *Hedâya*), Cal. Ed., Vol. III, p. 698.

Under the Transfer of Property Act, actionable claims are transferable, but under s. 135 the debtor is entitled to a discharge upon paying the transferee the price actually paid by him with incidental expenses and interest. This provision does not apply to gifts, but whether it would apply to a *hiba-bil-ewaz* is a question not unattended with difficulty. A *hiba-bil-ewaz*, where not in reality a *hiba simple*, is, in its legal incidents, equivalent to a sale, and yet is subject

therefore which was endeavoured to be raised in the case of *Mullick Abdul Guffoor* v. *Musst. Maleka*[1] has no foundation whatsoever. On the contrary, the Hanafi Law, as given in the *Kifâya*, expressly recognises the legality of gifts of incorporeal rights and *choses in action*. And custom (*urf*), to which Mahommedan lawyers have always attached considerable force in deciding questions on the ground of *istehsân* ("favourable construction" or "liberal interpretation,") to make the law harmonise with social progress, has accepted the rule and carried it into practice in different directions. Hence the gift of Government securities, which only carry with them the right of drawing interest on them,[2] the grant of *malikana* rights, which confers on the donee the right of obtaining from Government the proprietor's share in the income of an estate, and the like, form frequent subjects of gift. Similarly, under the Mahommedan sovereigns, assignments of revenue, which were called *Suyûrghul* grants, were often transferred by the grantees. *Mullick Abdul Guffoor* v. *Musst. Maleka.*

A gift of property in the occupation of tenants is lawful,[3] for this implies the grant of the right to receive the rents from the occupying tenants or lessees. But when property is held by another under a lease or *ijara*, it cannot be given so as to convey the actual possessory right to the donee, or to enable him to obtain direct, or what is called in the legal language of this country, *khas* possession Gift of property in the occupation of tenants.

in most of its aspects to the rules governing *hiba simple*. Would s. 135 then apply to the case of a *hiba-bil-ewaz*, where some consideration is proved, bearing in mind the provisions of s. 129? It must be borne in mind, however, that s. 135 does not apply to a mortgage, which is an interest in immoveable property.

In case I, Macnaughten's Mahommedan Law, Precedents of Wills, it is declared, that "the term *tamlîk* is one of general import, and may be applied to a gift, whether unconditional or conditional, to a sale or to a will. But the term *hiba* (gift) signifies the immediate transfer of property to another without consideration. Thus the difference between an assignment of proprietary right and gift is, that the one is general and the other particular."

Again, there is this passage in the *Ashbâh-wan-Nazâir*:—"The circumstances which constitute *tamlîk* are interchange of property; dower, compensation by a wife to her husband for divorce from him, inheritance, gift, charity, bequest, endowment or appropriation, plunder, or conquest over lawful things and animals, finding of waifs, and amends to a person killed and subsequently inherited by his heir are all *tamlîk*."

[1] I. L. R., 10 Cal., 1112.

[2] *Nawab Amjad Ally Khan* v. *Mohamdi Begum*, 11 M. I. A., p. 517; *Dorab Ally Khan* v. *Suliman Kadr*, I. L. R., 8 Cal., p. 1.

[3] *Majmaa-ul-Anhar*.

of the subject-matter of the gift, as it will be inconsistent with, and in contravention of, the contract between the donor and his lessee. But there is no rule to prevent the assignment or gift of the right to receive the rent reserved under the lease. The passage in the *Fatâwa-i-Alamgiri*,[1] "but if it be in the hands of an usurper or of a pledgee, or of a *mustâjir* (hirer or lessee),[2] the gift is not lawful for want of possession," has been wholly misunderstood. It refers to the legality of the gift so far as the right to the *actual* possession of the property is concerned, but does not in any way contemplate the assignment of the right to receive the rent from the lessee.

Besides, the term *mustâjir* does not occur in the *Hedâya*.

The passage in the *Hedâya* (Arabic) runs thus :—

ما اذا كان في يده او في يد مودعه لان يده كيده بخلاف ما اذا كان مرهونا او مغصوبا او مبيعا بيعا فاسدا لانه في يد غيره او في ملك غيره والصدقة في هذا مثل الهبة

The gloss of the *Kifâya* on the above is the following :—

بخلاف ما اذا كان مرهونا او مغصوبا الى اخره يعني اذا كان مال الاب مغصوبا او كذا وكذا لم يتم الهبة بالعقد لانه في يد غيره في الرهن والغصب او في ملك غيره في البيع الفاسد فان قيل ينبغي ان لا يتم الهبة اذا كان في يد مودعه لاشتراط الكمال في القبض وكون هذا القبض حكميا وهو نقص من القبض حقيقة قلنا القبض حكما كاف لاتمام الهبة

In the *Majmaa-ul-Anhar*, the words *Murtahin* (pledgee) and *Mustâjir* (lessee) do not occur with reference to the subject mentioned in the *Fatâwa-i-Alamgiri*, the restriction apparently being confined to properties in the hands of a *Ghâsib* (usurper) and properties transferred under an invalid sale (*bai-i-fâsid*).

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[1] *Alamgiri*, III, p. 521.

[2] The term "*ijara*" or lease, from which *mustâjir* is derived, under the Mahommedan Law, is not restricted to a lease of lands or immoveable property. It comprehends various classes of contracts which come under the head of Bailment, with the exception of pledge and deposits, which are treated separately under the head of *Rahn* and *Wadiat* respectively; *Majmaa-ul-Anhar* (Constantinople Ed.), p. 343, Chapter on Gifts.

Under the Hanafî Law there is no hypothecation without seisin.[1] Consequently, when a property is in the hands of a mortgagee or a bailee, the interest of the mortgagor or bailor, *viz.*, the reversionary right can only be conveyed by gift to the donee, and not the actual possessory right, which by the fact of bailment or mortgage has been transferred to the mortgagee in possession, or the bailee; so where immoveable property is in the occupation of a lessee or a tenant, the right of receipt to the rents alone can be granted by the donor. The Bombay High Court, in the case of *Mohinudin* v. *Manchershah*,[2] has decided that lands in the possession of a mortgagee cannot form the subject of *hiba* under the Mahommedan Law. This view is founded upon an erroneous apprehension of the Hanafî Law, under which seisin is requisite for hypothecation. Under the Mâliki Law, seisin is not necessary. But, according to the correct view of the Hanafî doctrine on the subject, there is nothing in it to preclude the mortgagor from granting his equity of redemption to another. On the contrary, under the law relating to *hawâlât*,[3] the debtor may transfer his liability to another. And, as the property forms the security for the debt, the transferee obtains the right to redeem the property subject to the payment of the debt. But, when the property is not in the hands of the mortgagee, as is usually the custom in this country, and is only burdened with certain debts, which are secured upon it, the mortgagor is perfectly entitled to make a disposition thereof.

Hypothecation.

Mohinudin v. *Manchershah.*

The gift of a property in the hands of a usurper, probably stands on a different footing. The right of the donor to such property is a mere inchoate right, *viz.*, to sue for recovery of possession, and it is possible that in early times the gift of a mere speculative right of suit was regarded with disfavor. But there seems to be no sufficient ground for holding that where a property to which a person is rightfully entitled happens to be in the hands of another claiming adversely to him, the rightful owner may not make a gift of the same to a third person. In the case of *Mohammed Bukhsh Khan* v. *Hossaini Bibi*,[4] the Privy Council laid down the principle that where a gift is public and authorises the donee to take posses-

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[1] *Hedâya*, III, p. 189.
[2] I. L. R., 6 Bom., p. 650.
[3] *Hedâya*, II, p. 606.
[4] L. R., 15 Ind. App, p. 81.

sion which is in fact taken subsequently, the gift is not invalid on the ground that the donor was not, at the time, in possesion of the subject of the gift. In the case of *Mohinudin* v. *Manchershah*,[1] the Bombay High Court has held that the sale of property of which the vendor is out of possession is valid. Consequently, a *hiba-bil-ewaz* thereof, which is equivalent to a sale in its legal incidents, would without question be valid.

Regarding the validity of a gift of lands and tenements in the occupation of tenants, the judgment in the case of *Mullick Abdul Guffoor* v. *Musst. Maleka*[2] has settled the question beyond any room for doubt. The Chief Justice dealing with the arguments urged against the validity of the gift said :—

"The question, therefore, in this Court, so far as this deed is concerned, has been, whether having regard to the subject-matter of the gift, and the fact of there having been no actual partition made of it at the time when the deed was executed, as between the two donees, the transaction is valid in law as against the plaintiffs."

"This question has been argued before us at some length, and we are much indebted to the learned Counsel on both sides for the pains which they have taken to refer us to all the authorities upon the subject. But having heard the matter fully argued, we are satisfied that the gift is valid, and that the conclusion at which the Lower Court arrived is just."

"The property, which is the subject of the gift, consists of several zemindaries, and shares in zemindaries, let out to tenants and ryots, as such estates usually are ; a good many lakheraj properties also let out to tenants ; several *malikana* rights of some value, and a variety of house-property in Patna, and elsewhere, consisting of houses, sheds, roads, gardens, &c."

"There is no satisfactory evidence as to how this latter property was occupied or utilized at the time when the gift was made."

"The arguments on the part of the plaintiff resolve themselves into three main points : —"

"1*st*, That by Mahommedan Law, a gift cannot be made of lands which are not in the possession of the donor, nor of incorporeal

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[1] I. L. R., 6 Bom., p. 650.

[2] I L. R., 10 Cal., 1112.

properties, such as rents, *malikana* rights and the like; 2*nd*, that an undivided share of a house or a zemindari cannot be made the subject of a gift; and 3*rd*, that a gift to two persons without previous division and separation is invalid."

"In dealing with these points, we must not forget that the Mahommedan Law, to which our attention has been directed in works of very ancient authority, was promulgated many centuries ago in Baghdad, and other Mahommedan countries, under a very different state of laws and society from that which now prevails in India; and that, although, we do our best here in suits between Mahommedans to follow the rules of Mahommedan Law, it is often difficult to discover what those rules really were, and still more difficult to reconcile the differences which so constantly arose between the great expounders of the Mahommedan Law ordinarily current in India, namely, Abû Hanîfa and his two disciples."

"We must endeavour, so far as we can, to ascertain the true principles upon which that law was founded, and to administer it with a due regard to the rules of equity, and good conscience, as well as to the laws, and the state of society and circumstances which now prevail in this country."

"Having premised thus far, we think that the first of the above points, although it has occupied some time in argument, may be very readily disposed of. In fact it appears to us to have been already settled."

"We have been referred to several authorities, and, amongst others, to the *Durrul Mukhtar*, *Book on Gifts*, p. 635, which lays down that no gift can be valid unless the subject of it is in the possession of the donor at the time when the gift is made. Thus, when land is in the possession of a *usurper* (*or wrong-doer*), *or of a lessee or mortgagee, it cannot be given away;* because in these cases the donor has not possession of the thing which he purports to give."

"But we think that this rule, which is undoubtedly laid down in several works of more or less authority, must, so far as it relates to land, have relation to cases where the donor professes to give away *the possessory interest* in the land itself, and not merely a reversionary right in it; of course an actual seisin or possession cannot be transferred, except by him who has it for the time being."

"It is possible, too, that these texts may be explained by what we are informed was the law in Baghdad in early times with reference to land let on lease; we are told that an *ijara* lease, which in this country means generally a farming lease of ryoti holdings, meant, according to the law of Baghdad, a lease of the land itself or its usufruct; and that the owner of land having made such a lease, could not by law transfer his reversionary interest, so as to give the transferee a right to receive the rent from the *ijaradar*. (See *Fatâwa-i-Alamgiri*, Vol. III, *Book on Gifts*, p. 521.)"

"Whether this is the real meaning of the authorities may be doubtful; but it is certain that such a state of the law in this country would render the transfer by gift of a zemindari and other landlords' interest simply impossible: lands here are almost always let out on leases of some kind, and there are often four or five different grades of tenants between the zemindar and the occupying ryot. What is usually called *possession* in this country is *not actual or khas possession*, but the receipt of the rents and profits; and, if lands let on lease could not be made the subject of a gift, many thousands of gifts, which have been made over and over again of zemindari properties would be invalidated. If we were disposed to agree with this novel view of Mahommedan Law (which we are not), we think we should be doing a great wrong to the Mahommedan community, by placing them under disabilities with regard to the transfer of property, which they have never hitherto experienced in this country. Such a view of the law is quite consistent with several cases decided by the Sudder Dewany Adawlut, (under the advice of the *Kâzis*,) and also by this Court (see 1 Select Reports, 5, 12, and 115 note; 1 Bombay High Court Reports, 157; 16 W. R., 88; and 12 W. R., 498); and it is directly opposed to the case of *Amirunnissa* v. *Abedunnissa*[1] decided by their Lordships of the Privy Council."

"In that case a gift of large zemindaries was held to be valid, although it is clear that they consisted, as such estates generally do, of tenures and interests of all kinds; no objection was then taken to the gift upon the ground that has been urged before us here, and indeed, so far as it appears, that point has now been taken for the first time."

[1] 23 W R., 68; s c. L. R., 2 Ind. App, p. 87.

"Similarly, as regards the *malikana* rights, we are not aware of any reason, why rights of this description should not be made the subject of a gift, in the same way as rents or other incorporeal property of that nature. We have already decided that reversionary interests, carrying with them the right to receive rents, may be thus transferred; and other *choses in action*, which give the parties entitled to them the right to receive money from the Government or third persons, may be made the subject of a gift."

"A *malikana* right is the right to receive from the Government a sum of money, which represents the *malik's* share of the profits of the revenue-paying estate, when from his declining to pay the revenue assessed by the Government, or from any other cause, his estate is taken into *khas* possession of Government, or transferred to some other person, who is willing to pay the rate assessed. There is nothing in principle, so far as we can see, to distinguish a *malikana* right from a right to receive rents, or the dividend payable upon Government paper."

The Chief Justice then proceeded to deal with the argument urged on behalf of the appellant that the gift was bad on the ground of *mushâa*. "It is urged: (1) that a gift of an undivided share in any property is invalid because of *mushâa*, or confusion, on the part of the *donor*; and (2) that a gift of property to two donees without first separating and dividing their share is bad, because of confusion on the part of the *donees*."

"But it must be borne in mind that this rule applies only to those subjects of gift, which are capable of partition. See the *Hedâya*, Vol. III, *Book on Gifts*, p. 293, where the rule laid down is to the effect that—'A gift is not valid of *what admits of division* unless separated and divided.' See also *Baillie's Mahommedan Law*, 2nd Ed., p. 520; *Fatâwa-i-Alamgiri*, *Book on Gifts*, p. 521; *Macnaughten's Mahommedan Law*, p. 201."

"The rule, therefore, applies only to gifts of such property as is capable of division; whereas, reversionary interests, or *malikana*, or other *choses in action*, are not capable of division."

"It is said that one main reason for this rule, which applies only to gifts, and not to sales, is to protect a man's heirs against gifts made in defeasance of their rights. We were referred to certain texts which apparently favoured that view; and it is also

probable that another reason for the rule was to protect creditors against fraudulent gifts made by debtors, it being a well-known test of the *bona fides* of a gift, whether possession of the thing given has passed to the donee."

"It has been urged upon us, very strongly, that according to this rule of *mushâa*, the gift, which was made to the defendants in this case, is wholly void, because, the gift being of lands, no partition of such lands was made; and even supposing the gift to be valid, as regards the zemindari properties which were let out on lease, it would still be invalid as regards the house-property, gardens, sheds, &c., which are not shown to have been let out on lease, and which were capable therefore of actual partition."

"We think, however, that this objection is not well-founded, as regards any part of the property in question."

"As regards the zemindaris, the estate of the donor, as we have seen, was an interest in reversion, and the property which was transferred by the gift of these zemindaris was merely that sort of estate which entitled the donees to receive the rents and profits. We find from the evidence of the defendants, (which was so clear upon this point that the Judge in the Court below desired to hear no more than that of two of the witnesses,) that during Kaniz Fatima's life-time, she and Muleka were in separate collection of the rents, and that immediately upon the gift being made the possession was transferred, in the only way in which it could be transferred, to the two donees."

Gift of a debt under the Shiah Law.

Regarding the assignment of a *chose in action*, there are two divergent opinions in force among the Shiahs. The Mohakkik states in the *Sharâya-ul-Islâm*, "that the donation of a debt, or what rests on the obligation of another, is not valid to any other than the debtor or the person by whom it is due according to the generally received doctrine, by reason of the condition already mentioned that it requires possession to complete it, whereas if made to the debtor himself, it is quite valid and operates as a release of the debt."[1] Whilst the great author of the *Mabsût* and other eminent Shiah jurists agree with the Hanafi lawyers in holding that, according to a liberal interpretation, the transfer or assignment of a debt to a third person by the creditor is lawful. And even the *Jâmaa-ush-*

[1] *Sharâya-ul-Islâm*, p. 242.

Shittât, which often adopts the opinion of the Mohakkik, says that the gift of a debt to a third person is valid according to *urf* (custom). The doctrine laid down in the *Mabsût* has been so generally approved by *urf* or custom, which is the embodiment in practice of the general consensus of a progressive community, that the rule mentioned by the author of the *Sharâya* may be regarded as entirely exploded.

Under the Hanafi Law the release of a debt to the debtor is valid without his consent, but becomes inoperative, if the debtor refuses to accept the release. Hanafi Law.

Here, again, there is a conflict of opinion among the Shiah jurists. The author of the *Mabsût* declares the release of a debt (*ibrâ*) to a debtor is not valid or operative without the debtor's express or implied consent. According to the author of the *Sharâya* such a release is valid without acceptance,[1] and though he does not say what the result would be, if the debtor rejects it, his meaning probably is that it would be effective. In the *Zakhîra-i-Maâd*, Shaikh Zain-ul-aâbidîn, late Mujtahid of Bagdad, adopts the opinion of the *Mabsût*, and in the *Jâmaa-ush-Shittât*, a case is given from which it would appear that under the Shiah Law, as under the Sunni Law, when a creditor discharges the debtor, he cannot again enforce the liability, but the debtor may insist upon his performing any obligation which rests on the creditor, or even force him to accept the debt.

Speaking of the subject-matter of gifts, what may or may not form the subject of *hiba*, the *Fatâwa-i-Alamgiri* has the following :—

"The thing itself must be in existence at the time of the gift, so that if one should give the fruit that may be produced by his palm-tree this year, or what is in the womb of this slave, or of this sheep, or in its udder, the gift is unlawful though power be given to take possession at the time of production, as of birth, or of milking ; so also as to the butter in milk, the oil in sesame, or the flour in wheat with similar powers. The subject of the gift must also have legal value, and possession must be taken of it to establish in it the right of the donee, and if in its nature divisible it must be divided and distinguished from, and not joined to, or occupied with anything else that is not given. Hence the gift of land without the crop then What may or may not form the subject of *hiba*.

[1] *Sharâya-ul-Islâm*, p. 242.

standing on it, or of a palm-tree in bearing without its fruit, and *vice versâ* is unlawful. So also of a house or vessel in which there is something belonging to the donor without its contents."

Mushâa. Divergence between the schools.

As regards the latter principle, there is considerable difference between the Hanafîs on one side and the Shâfeïs and the Shiahs on the other. Under the Hanafî Law, if the subject is in its nature

The Hanafî doctrine.

divisible, or forms part of a thing which is capable of physical partition or division the gift is not valid until it is divided off, or separated from the other property of the donor which is not given. But where it forms part of an indivisible thing, or of a thing which cannot be divided without considerable damage to the entire property, the gift is valid though there is no partition.

The Shiah and Shâfeï doctrines.

The Shiahs and Shâfeïs differ *in toto* from the Hanafîs regarding this principle. They maintain that the gift is valid in either case, because a gift is a *tamlîk* and valid as such in respect of all things whether they form portions of a divisible or indivisible thing. The

Shiah doctrine.

Shiahs, however, insist that there must not be a complete ignorance as to the substance of the gift, *viz.*, that the subject should be sufficiently indicated in order to leave no room for doubt as to what is given. Indefiniteness or ignorance as to the very subject-matter of the gift would avoid the grant, but not mere ambiguity which can

Shâfeï doctrine.

be explained by other circumstances. According to the Shâfeïs, mere indefiniteness does not render a gift void, for an undefined but known share may be as much the subject of proprietary right as a definite specific share.

Impartible *mushâa.* The rule of Hanafî Law.

According to the *Fatâwa-i-Alamgiri*, "the gift of a thing which is separated from, and emptied of, the property and rights of the donor is lawful, so also of a *mushâa* or undivided part of a thing that does not admit of partition, or is of such a nature that some kind of benefit or advantage that can be derived from it while whole or undivided, cannot be derived from it after partition, as for instance a small house or a small bath. But the gift of a *mushâa* in a thing that admits of partition, consistently with the preservation of all the uses which might be made of it before partition, is not valid. *What is required is, that the thing given be partitioned and separated at the time of taking possession, not at the time of gift.*"

"The gift of a *mushâa* or undivided part of what does not admit of partition is lawful to a partner or to a stranger. The gift of a

mushâa in what does admit of partition is not lawful either to a partner or one who is not a partner, and if possession is taken of it, Hisam-ud-din has reported that it will not avail to establish property in the donee, but he has said in another place that it will avail to establish it *invalidly, and so it has been decided.*" The subject of *mushâa* has furnished a fruitful source of discussion in the law-courts of this country, and the difficulties with which it is surrounded render it necessary, that the meaning of the doctrine, its *raison d'être* and the legal principles which govern it, should be considered with some degree of care.

Mushâa—its raison d'être.

Mushâa has been defined by Freytag as meaning "pluribus communis." Every joint undivided property subject to the right of more than one individual is a *mushâa*. The word *mushâa* is derived from *shuyûu* which means confusion. Where several persons own a particular property joint and undivided, no one of them can predicate that his interest is attached to any specific portion. The gift by one of the co-sharers of his share in such a property is likely to create confusion in its enjoyment by all the co-sharers. It will be seen, therefore, that the doctrine of *mushâa*, which implies a prohibition against the *hiba* of joint undivided properties which are partible in their nature, owes its origin among the Hanafis to a rather nervous dread on the part of some of their principal lawyers, notably Abû Hanîfa, that unless divisible things were divided off, it would give rise to disputes and complications in the enjoyment of such subjects.

Abû Hanîfa carries his objection to indefiniteness, in other words, to the gift of joint undivided property which is capable of partition, to the utmost limit. But there is a marked difference between him and his disciples on the point in question. Generally speaking, their views are more in accord with the requirements of a progressive community and less casuistical than those of Abû Hanîfa. The following passage from the *Alamgiri* will bring into prominent relief, not only the views entertained by the early writers on the subject, but also the nature of the divergence between the master and disciples, though the principles laid down therein must be taken subject to the enunciation of later authorities.

"The gift of a *mushâa*," says the *Fatâwa-i-Alamgiri*, "that admits of partition to two men or to a group is valid according to

the two disciples, and invalid according to Abû Hanîfa. But it is not *void*, so that it avails to the establishment of property by possession. Sadr-ush-Shahîd[1] has remarked that when a person has given what admits of partition to two men, so that the gift is invalid according to Abû Hanîfa, and possession is then taken, *the right of property is established in them invalidly, and so it has been decreed*. Confusion on both sides in property susceptible of partition prevents the legality of gift, according to them all, and when the confusion is only on the side of the donee, it prevents the legality of the gift, according to Abû Hanîfa, *though it has not that effect in the opinion of the disciples*. And if one should make a gift to two persons who are poor, it would be lawful according to them all, as in the case of *sadkah*, or pious offering. But if they are rich, and the gift is made to each of them in halves, or if it is made vaguely, by saying, 'I have given to you both,' or with an excess in favour of one, as by saying, 'To this one a third of it, and to this one two-thirds of it,' it is unlawful in the three cases according to Abû Hanîfa; while, according to Mohammed, it is lawful in them all; and according to Abû Yusuf, it is lawful in the two cases where the gift is made to both indefinitely, or in halves, but is not lawful with any excess in favour of one of them. When two persons have given a mansion to one person, the gift is valid, according to all opinions."

"A gift by one person to two others of the half of two slaves, or of two or ten pieces of cloth of different kinds, as cloth of Merv and cloth of Herat, is lawful when followed by possession. So also of cattle of different kinds. But if the cloth or cattle be of the same kind, the gift is not lawful, unless a partition is first made. In like manner, the gift of a share in a wall or way or bath is lawful, *when accompanied with a power to take possession*. As, for instance, when a house is given with all its rights and boundaries, which include a party wall, or a right of way, held in common with other persons, the gift is lawful as to these also."

"If half a mansion were given by way of gift, or as *sadkah*, and delivered, and the donor should then sell, or give it by way of charity to another person, it is mentioned in the *Asal* that the sale

[1] A great jurist of Khorasan who flourished in the 13th century.

would be lawful. And it is also reported in the *Asal* that if half a mansion were given to a person, and delivered to him, and the donee should sell it, the sale would not be lawful, and it is expressly stated in some *fatâwa* that this is approved. But it is said in other authorities, *that possession under an invalid gift avails to the establishment of property, and that it has been so decided, contrary to what is stated to be valid in the Imâdia; and the word fatwa, or decision, is stronger than the word valid.*"

Possession validates gift of *mushâa*.

"If a man should make a gift of a mansion in which there are some effects belonging to him, and should deliver the mansion to the donee, or deliver it with the effects, the gift would not be valid. But there is a device by which a valid gift can be made of the mansion; and it is by first making a deposit of the effects with the donee, vacating them for him, and then making delivery of the mansion. And, in the opposite case, if he should make a gift of the effects without the mansion, and vacate them for the donee, and then make delivery of the mansion, the gift would be valid; and if he should make a gift of the mansion and effects together, and vacate them both for the donee, the gift would be valid. If a separation is made in the delivery, as by giving one of the two and delivering it, and then by giving the other and delivering it, and a beginning is made with the mansion, the gift of the mansion is not valid, but that of the effects is valid, while, if a beginning were made with the effects, the gift of both would be valid together. And if one should give land without a growing crop, or the crop without the land or trees without their fruit, or fruits without their trees, and vacate them for the donee, the gift would not be valid in either case; for the union of each with its fellow is such that the parts of one are in contact with the parts of the other, and the gift is like that of a *mushâa* in a thing susceptible of partition. But if he should give each of them separately, as, for instance, the crop and then the land, or the land and then the crop, and deliver them together, the gift would be lawful as to both; while, if he separate them in delivery, it is valid as to neither, whichever he may begin with. If he gives the mansion and does not deliver it till he gives the effects also, and then delivers them together, the gift is lawful; in the same manner as when one gives a bag and corn-sacks, and does not deliver them until he makes a

gift of the corn contained in them, and then delivers both, the gift is lawful as to the whole. But if the mansion is given empty, and then delivered *mushghûl*, or occupied, it is not valid; nor would his saying, 'Take possession,' or 'I have delivered,' be valid when the donor, or his people, or goods are in the mansion."

Gift of things occupying and occupied.

"The gift of a *shâghil*, or thing which occupies another, is lawful, but the gift of the *mushghûl*, or thing occupied, is unlawful. The principle in this kind of cases is that the thing given being occupied with property of the donor prevents the taking of possession, which is necessary to the completion of the gift, but that the thing given occupying the property of the donor has not that effect. As an example of this, the gift of a leathern bag, in which there is food of the donor's, is not lawful, while a gift of the food in the bag is lawful. And if one should give a beast of burden having a load upon his back, the gift would not be lawful; but if the burden is given, and beast and burden delivered together, the gift is lawful. So also the gift of a pitcher without the water in it is not lawful, but the gift of the water without the pitcher is lawful. *If a man should give the crop on his land*, or *the fruit on his tree, and direct the donee to reap or to gather it, and he should do so, the gift would be lawful on a favourable construction;* but if he is not permitted to take possession and does so, he is responsible."

A gift rendered void by a right being established in part of it.

"If a person should give a mansion with its effects and deliver them both, and a right is subsequently established to the effects, the gift of the mansion is valid. So also if one should give sacks with goods in them, or a bag with the food in it, and deliver them to the donee, and a right is subsequently established to the contents in either case, the gift remains complete as to the sacks and the bag. But if one should give a mansion of which possession is taken, and a right is then established in a part of it, the gift is void. And if one should give land with the crop upon it, or a tree with the fruit on it, and make delivery of both, and a right should then be established in the crop or the fruit, the gift in the land or trees is void. A person makes a gift of his land with the crop on it, and cuts and delivers the crop, after which a right is established in one of them, the gift is void as to the other."

"When a man has given property which is in *muzâribat*, *i.e.*, invested in partnership business, to the *muzârib*, *i.e.*, managing

partner, and part of it is in his hands, and part of it due by others, the gift is lawful as to the former, but as to the remainder it is lawful only if the donor have said, 'Take possession;' and if any part of the property be profit, the gift is not lawful. When one of two partners has said, 'I have given thee my share of the profit,' it has been said that if the property itself be in existence, the gift is not valid, by reason of its being *mushâa* in what admits of partition; but if the partner has lost the property, the gift is valid by reason of its being an *iskât*, or extinction of right."[1]

Gift by one partner to another of a share in the profits not unlawful.

It will be seen from the above extract, which has been given *in extenso*, in order to bring clearly before one's mind the condition of society in which the rules were promulgated, and what were the subjects to which they were in the main applicable.

The principles, therefore, have been construed, as I shall endeavour to show, by the later lawyers most liberally. I shall also try to prove that the spirit of the Mahommedan Law, even where it has been subjected to patristic influences, is in accord with the requirements of progress. Bearing in mind the principle, that *possession validates an imperfect or incomplete gift*, the author of the *Majmaa-ul-Anhar*[2] defines thus the term *kabz-ul-kâmil*, "complete possession."—"And the meaning of *kabz-ul-kâmil* (complete seisin) with reference to moveables depends upon their nature, and with reference to immoveable property as is suitable to its nature, as the taking of the key of a house, which is equivalent to its seisin." * * * "According to Abû Hanîfa, if a person make a gift of his house to two people, it is not valid and (this is his view) regarding all objects which are capable of division, but according to the two disciples the gift is valid."[3] Nor is it valid according to Abû Hanîfa, if the donor define the shares. But the accepted doctrine is directly opposed to his view. "If a man make a gift of a moiety of his house in favour of one person and of the other half in favour of another person, and deliver the same to both simultaneously (معا) it is a valid gift. But if the delivery to one is before

Kabz-ul-kâmil, or complete possession.

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[1] I have given these dicta in a consecutive form, leaving out the names of the books from which the compilers of the *Fatâwa-i-Alamgiri* collected them.

[2] p. 342.

[3] *Fatâwa-i-Kâzi Khân* (Cal. Ed. II, p. 282).

the other, it would not be valid, although Abû Hanîfa says it is not valid in either case."[1]

Possession perfects an invalid gift.

A *hiba-bil-mushâa* or a gift of an undivided joint property is not void but only invalid, and possession remedies the defect.

The *Majmaa-ul-Anhar*[2] says "and Yaakûb Pasha has held, that if a person make a gift to two persons of a thing which is capable of division, that is an invalid *hiba*, but it is not (*bâtil*) void according to Imâm Abû Hanîfa, so if the donees take possession, it establishes property in them according to his saying and the *fatwa* is according to it." This view is in exact accordance with what Sadr-ush-Shahîd holds. That a right of property in a share of a joint undivided property comes into existence upon possession being taken of it is clear from the following passage in the *Majmaa-ul-Anhar* :—"In the *Jâmaa-ul-Fusulain* and *Bazâziah* it is stated that *hiba-i-fâsid* is perfected by possession and the *fatwa* is according to this, though some have said, the other is correct, *but the word 'fatwa' is stronger than correct.*" Regarding the words of the author that *mushâa* prevents the completeness of a gift, the commentator says, "the reason is that seisin is necessary, so it is mentioned in the *Fusulain*, but Zailye has held that the gift of such a thing in which the right of the donor is attached is invalid, and in the *Imâdia* it is stated that the gift is only incomplete ; and Hamawi has stated in his commentary on the *Ashbâh* that this doctrine is subject to two sayings owing to which difference has arisen regarding such *mushâa* which is capable of division, that is, whether such *hiba* is void or only incomplete, *but it is more correct that it is incomplete as is stated in the Bazâziah.* And in the *Durrur-ul-Ahkâm* it is stated that an invalid *hiba* (gift) confers the right of property by possession and the *fatwa* is upon this, so in the *Fusulain.*"[3]

Fatwa.

The *Radd-ul-Muhtâr* commenting on the above passage in the *Durrur* says, "in the *Durrur* it is stated from the *Fusulain* that possession under an invalid gift would avail to establish the right of property and the *fatwa* is in accordance with this. And so also it is stated in the *Bazâziah*, which is contrary to what is mentioned

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[1] *Fatâwa-i-Kâzi Khân*, p. 262. [2] *Majmaa-ul-Anhar*, p. 345.

as correct in the *Imâdia*, but the word *fatwa* is stronger than the word *correct*, &c."[1]

Actual possession, however, does not seem to be necessary to complete the *hiba*, or at least to destroy the defect arising from the fact of a certain property being *pluribus communis*. The authority to take possession is regarded by the jurists as sufficient. Authority to take possession

"In the *Himâdia* it is stated from the *Jâmaa-ul-Fatâwa*, that if a person make a gift of the crop which is standing on the land, or of the dates which are hanging on the trees, or of the scabbard which is on the scimitar, or of a building, or of dinars which are owing from another person, or of anything which may be measured, and authorize (the donee) to reap it, or to take it down, or to take it off, or to take possession thereof, or to measure it, *and (the donee) has done it*, it is valid by a liberal interpretation."[2] And again, "If the donor himself or his deputy makes a division, or if the donor authorizes the donee to make the division with his partner, this makes the gift complete *(kâmil)*."[3] And this opinion is still further enforced by reference to Kâzi Khân. "If a gift be made to a man, and he appoint two persons to take possession on his behalf, and they both take possession, that is lawful as is stated in Kâzi Khân."[4]

From the examples given in the Arabian law-works, it can easily be inferred that the doctrine of *mushâa* was applicable only to small plots of lands and houses; it does not seem to have been contemplated by the Arabian jurists, that the doctrine should be applicable Doctrine of *mushâa* not applicable to zemindaris.

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[1] لكن فيها (اي في الدرر) عن الفصولين الهبة الفاسدة تفيد الملك بالقبض وبه يفتى ومثله في البزازية على خلاف ما صححه في العمادية لكن لفظ الفتوى آكد من لفظ يصح كما بسطه المصنف مع بقية احكام المشاع وهل للقريب الرجوع في الهبة الفاسدة قال في الدرر نعم وتعقبه في الشرنبلالية بانه غير ظاهر على القول مفتى به من افادتها الملك بالقبض Vol IV, p 781

[2] *Radd-ul-Muhtâr*, Vol. IV, p. 782.

[3] *Radd-ul-Muhtâr*, Vol. IV, p. 780.

فان قسمه الواهب بنفسه او نائبه او امر الموهوب له بان يقسم مع شريكه دل ذلك تتم به الهبة * Delivery of possession (*taslim*) is presumed

وكل الموهوب له رجلين بقبض الدار فقبضاها جاز خانية

[4] *Ibid*, p. 779.

to specific shares in large estates or zemindaris. At the time when this doctrine was first enunciated among the Hanafis, there does not appear, from contemporaneous records, to have existed large estates such as are known to us in this country. The Arab conquest had broken up the landed proprietary of ancient Persia, and the *Dehkân*, who was a zemindar under the Sassanides, became a mere husbandman. Under the Arab rule, the land of the country was distributed either among the Arab colonists, or allowed to remain in the hands of the old proprietors on a scale which would prevent their forming a combination to destroy the new government; such seems to have been the economic condition of society about the beginning of the Hanafi Law, and the time when the early jurists of that school flourished. The wealth of the people was chiefly derived from common trade, immense flocks of sheep and goats, large groves and plantations. Apparently, therefore, the doctrine of *mushâa* was not intended to apply to large landed estates such as came into existence in later times.

Abedoonnissa v. Ameeroonnissa.

The Judicial Committee of the Privy Council, in the case of *Abedoonnissa* v. *Ameeroonnissa*, discussed the question whether the objection of invalidity to a gift on the ground of *mushâa* was applicable to shares in a zemindary which themselves paid revenue separately.

"A legal objection to the validity of these gifts was made in the High Court on the ground that the gift of *mushâa*, or an undivided part in property capable of partition, was, by Mahommedan Law, invalid. This point appears to have been taken for the first time in the High Court, and was argued at this Bar. That a rule of this kind does exist in Mahommedan Law with regard to some subjects of gift is plain. The *Hedâya* gives the two reasons on which it is founded: First, that complete seisin being a necessary condition in cases of gift, and this being impracticable with respect to an indefinite part of a divisible thing, the condition cannot be performed; and, secondly, because it would throw a burden on the donor, he had not engaged for, *viz.*, to make a division. (See Book XXX, c. i, 3 vol., 293.) Instances are given by the writers of undivided things which cannot be given, such as fruit unplucked from the tree, and crops unsevered from the land. It is obvious that with regard to things of this nature separate possession cannot be given

in their undivided state, and confusion might thus be created between donor and donee which the law will not allow."

"In the present case the subjects of the gift are definite shares in certain zemindaris, the nature of the right in them being defined and regulated by the public Acts of the British Government."

"The High Court, after stating that the shares were for revenue purposes distinct estates, each having a separate number in the Collector's books, and each being liable to the Government only for its own separately assessed revenue, and further that the proprietor collected a definite share of the rents from the ryots, and had a right to this definite share and no more, held that the rule of the Mahommedan Law did not apply to property of that description."

"In their Lordships' opinion this view of the High Court is correct. The principle of the rule and the reasons on which it is founded do not in their judgment apply to property of the peculiar description of these definite shares in zemindaris, which are in their nature separate estates with separate and defined rents. It was insisted by Mr. Leith that the land itself being undivided, and the owners of the shares entitled to require partition of it, the property remained *mushâa*. But although this right may exist, the shares in zemindaris appear to their Lordships to be, from the special legislation relating to them, in themselves and before any partition of the land, definite estates, capable of distinct enjoyment by perception of the separate and defined rents belonging to them, and therefore not falling within the principle and reason of the law relating to *mushâa*." And the same principle was enunciated in the case of *Shaikh Mohamad Mumtaz Ahmad* v. *Zubaida Jan*.[1]

When a gift *bi'l-mushâa* is made of property that does not admit of partition, it is a condition of the gift that the quantity be known or specified,[2] for if one were to give his share, the share being unknown, the gift would not be lawful as ignorance of the share might lead to disputes.[3] In the case of *Jaffar Khan* v. *Hubshee Bibi*,[4] it was held by the Sudder Court, that a gift of land forming a part of joint property to be valid must be distinct, and the boun-

Jaffar Khan v. Hubshee Bibi.

[1] L. R., 16 I. A., p. 205.

[2] *Sahiba Begum* v. *Atahamaun and others*, 4 Mad. Reports, p. 115.

[3] *Fatâwa-i-Alamgiri*, IV, p. 523. [4] 1 Sel. Reports, p. 12.

daries and extent of the property given be known. The older rulings of the Sudder Court, however, it must be admitted, gave effect to the objection based on the ground of *mushâa* to an extent perhaps not warranted by the spirit of the Mahommedan Law.[1] But the more recent decisions of the High Courts of Calcutta and Allahabad have taken a broader view of the question, and more in accordance with the principles enunciated in modern works like the *Majmaa-ul-Anhar* and the *Radd-ul-Muhtâr*. In the case of *Jewan Buksh* v. *Imtiaz Begum*,[2] the daughter of a deceased Mahommedan sued to set aside a gift of her father's estate made by him during his lifetime to the defendant his eldest son, and for possession of her share. It appeared that the gift to the defendant by the father comprised, amongst other properties, one-third share in certain joint and undivided zemindary villages. As the holder of these shares, the defendant's father was entitled to a one-third share of the profits of the villages after payment of the Government revenue, village expenses and costs of collection. The plaintiff contended that the gift of these shares was invalid on the ground of *mushâa*. The High Court held, that the gift of a defined share of landed estates was not open to the objection of *mushâa*, a defined share in a landed estate being separate property. This view appears to go beyond the expositions of the Hanafî jurists, though it may not probably be inconsistent with the spirit of the law.

Jewan Buk v. Imtiaz Begum.

Kasim Hussain and another v. *Sharif-un-nissa*.

In *Kasim Hussain and another* v. *Sharif-un-nissa*,[3] in which the gift was by one person to two donees, the *hibanâma* was in the following terms :—

"I, Bechi, do hereby declare that one-twelfth *muafi* share, and a dwelling-house containing a room facing north and east, and five yards of land in front thereof, two halls (*dalan*) facing the east, a door, a privy, a court-yard and a stair-case constitute my ancestral property, and are held by me under a partition deed. I have made *Kasim Hussain* and *Nazim Hussain* (defendants) absolute owners of the above property together with all its boundaries, '*asli*'

[1] *Meer Abdul Kureem* v. *Musst. Fuckrunnissa Begum*, 3 Sel. Reports, p. 41 note ; *Syud Shah Basit Ally* v. *Syed Shah Imam-ud-din*, 3 Sel. Reports, p. 176 ; *Musst. Khanum Jaun* v. *Musst. Jaun Bibee*, 1 Sel. Reports, p. 210.

[2] I. L. R , 2 All., p. 93.

[3] I. L. R., 5 All., p. 285.

and '*dakhil*' rights, whether large or small, and appertaining to it. The property is free from the right of any one else and unincumbered by hypothecation, charge, gift, sale or mortgage. There is nothing to prevent the validity of the transfer, and the property is in my exclusive possession up to this day, and I have placed them in proprietary possession thereof. Neither I or my heirs have any right or interest left in it. I have substituted (*Kasim Hussain* and *Nazim Hussain*) on the following terms :—During my lifetime the income of the property shall remain under my control ; after my death they shall become absolute proprietors thereof in equal shares, and apply its income to meet their necessary expenses ; they shall not have power at any time to transfer or create a charge upon the property ; should they directly or indirectly transfer the property, such transfer shall be invalid in Court in face of this instrument."

Upon a suit by one of her heirs, two grounds were taken to set aside the deed, *first* that it was a will, and therefore invalid as regards two-thirds, being without the consent of heirs, *second*, that the gift was bad on account of *mushâa*. With reference to the *first* objection, the learned Judges held as follows :—

"The deed purports to transfer the title in the donor's share in the *muafi* state to the defendants and constitutes them proprietors, but reserves to the donor the income for life. A gift of specific shares is not open to the objection under Mahommedan Law, and the gift is not otherwise void by reason of the condition for reserving to the donor the profits either for want of the seisin required by Mahommedan Law of the property given, or in consequence of the condition vitiating the gift. It was held by the Privy Council in *Nawab Umjad Ally Khan* v. *Mohumdee Begum*,[1] that though the transfer of a legal title will satisfy that provision of the Mahommedan Law which relates to the point of seisin in its legal and technical sense, yet that alone will not suffice when no intention exists to transfer the beneficial ownership either present or future, but when there is real transfer of property by a donor in his lifetime under the Mahommedan Law, reserving not the dominion over the *corpus* of the property, nor any share of dominion over the *corpus*, but simply stipulating for, and obtaining a right to the recurring

[1] 11 Moo. I App., p 517

produce during his lifetime, there will be a complete gift by Mahommedan Law. Their Lordships observe :—

'The text of the *Hedâya* seems to include the very proposition and to negative it. The thing to be returned is not identical but something different. See *Hedâya*, Chap. Gifts, Vol. III, Book XXX, p. 294, where the objection being raised that a participation of property in the thing given invalidates the gift, the answer is, the donor is subjected to a participation in a thing which is not the subject of his grant, namely, the use of the whole indivisible article, for his gift related to the substance of the article not to the use of it.' In that case the subject of the gift was Government Promissory Notes, the interest of which had been reserved by the donor, and their Lordships go on to say :—'Again, if the agreement for the reservation of the interest to the father for his life be treated as a repugnant condition, repugnant to the whole enjoyment by the donee—here the Mahommedan Law defeats not the grant but the condition, *Hedâya*, Chap. Gifts, Vol. III, Book XXX, p. 307.' The mere reservation of the income of the estate will not therefore vitiate the gift, and the Subordinate Judge's finding in this respect is erroneous. The deed contained a condition against alienation, but that will not vitiate the gift."

With reference to the second ground of objection the learned Judges said as follows :—

"The appellant's objection as to the finding in respect of the stair-case, door and privy is also valid. This portion of the gift has been disallowed, because the above things are undivided."

"On this subject the *Hedâya* on 'Gifts,' Book XXX, Ch. I, is as follows :—'A gift of part of a thing which is capable of division is not valid, unless the said part be divided off, and separated from the property of the donor, but the gift of part of an indivisible thing is valid.' The things referred to appear to be common to the occupants of the premises which in other respects were divided, and are incapable of division, and the donor gave all her interest in them to the donees, the gift is not, in consequence, invalid. It is obviously absurd to give effect to the gift in respect of a house, and disallow all means of ingress and egress."

A formal and solemn declaration by the donor that he had complied with all the requirements of the law in perfecting the gift

would be binding evidence of delivery of possession. This principle was accepted in the case of *Shaikh Muhamad Mumtaz Ahmad* v. *Zubaida Jan*[1] where their Lordships of the Privy Council held that a declaration by the donor in the deed of gift that possession had been given bound his heirs.

When two persons own a property jointly, either sharer may, under the Hanafi Law, give his share to the other, without the formality of a delivery of possession or any objection founded on the ground of *mushâa*. In the case of *Mahomed Bukhsh Khan* v. *Hosseini Bibi*,[2] the Judicial Committee of the Privy Council held that where a property is held by several co-sharers any one of them may give his share to any one of the other co-sharers, and that such a gift would not be open to the objection of *mushâa*.

A gift of a property *jointly* to two donees is valid if they are authorized to make a partition among themselves, or if they take possession of the subject-matter of the gift. In early times there seems to have been a doubt when one of the donees was a minor and the other an adult. "Some of our doctors," says the *Radd-ul-Muhtâr* "are of opinion, that if a gift is to a minor and an adult jointly without division of their specific shares in *mushâa* property it is invalid, and as the minor cannot himself take possession of his share, the gift cannot be completed." Gift to two donees valid.

And again, "some of our doctors say that if the gift is to one adult and one minor, the latter being in the *parwarish* (custody) of the former, or to two sons, one adult and the other a minor, it is not valid."[3] The reason upon which those principles are founded appears far-fetched, though the Allahabad High Court apparently recognized it in the case of *Nizam-ud-din* v. *Zabida Bibi*.[4]

In this case it appeared that one Sheikh Kadir Buksh devised certain property amounting to a one-fourth share of his estate to his eldest son Zahir-ud-din, subject, however, to this reservation, *viz.*, that a portion of the property situate on the north side of the River Ravi, and consisting of "lakheraj lands should pass on the testator's death to Zahir-ud-din, but that the remainder situate on the south of the river should be held and possessed by the testator's youngest son Aman-ullah for the purpose of collecting and paying *Nizâm-ud-din* v. *Zabida Bibi*.

[1] L R, 16 Ind App, p 205.
[2] L R, 16 Ind. App., p 81.
[3] See *post*, p. 86
[4] 6 N.-W P., H. C. Reports, p. 538.

the revenue due on both portions without any rendition of accounts, until such time as a competent son should be born to Zahir-ud-din," the reason being that Zahir-ud-din was unfit to look after the lands paying revenue to Government. On the death of their father, Zahir-ud-din and Aman-ullah held and possessed the property above-mentioned in accordance with the will of the testator. On the 1st of September 1864, Zahir-ud-din executed a deed of gift of the one-fifth share devised to him in favour of two of his sons, Nizam-ud-din and Sadr-ud-din, a minor. No mention was made in the deed as to the respective shares of the brothers, or as to the manner in which the property was to be held or divided. The deed was duly registered, and mutation of names was effected in respect of the lands on the north of the River Ravi in the same year. Zahir-ud-din died in 1869, leaving several daughters and a minor son, born after the execution of the deed of gift in favour of Nizam-ud-din and Sadr-ud-din, never having held possession of the property on the south side of the Ravi, which had remained in the possession of Aman-ullah and his son, who rendered no accounts of profits to Zahir-ud-din, and it was not till the year 1871 that the donees obtained possession. With regard to the property on the north bank of the Ravi, it appeared that the donees had been put into immediate possession. Upon a suit instituted by Zabida Bibi, one of Zahir-ud-din's daughters, to recover the share of the property left by her father to which she was entitled under the Mahommedan Law, by the cancelment of the deed of gift, the First Court held that the deed was valid, the property given being therein defined and specified. The Lower Appellate Court reversed the decree and remanded the case for the determination of the amount of the mesne profits due to the plaintiff, holding that the deed was, under Mahommedan Law, invalid, as the gift had been made without division or detail of the respective shares of the donees and as the donees had not obtained possession of a portion of the property, *viz.*, that situate on the south of the River Ravi, till after the decease of the donor. The Court, however, did not distinctly determine whether the deed had operated immediately in respect of the portion lying on the north of the river. It found that there were no good reasons for thinking the donor insane, or even a simpleton, although his father

had refused to allow him to manage lands paying revenue. In special appeal, the principal grounds were to the effect that the deed of gift was not invalid under the Mahommedan Law, as the donees had received such possession as the donor could grant of the lands on the south of the Ravi and had received actual possession of those on the north, and, although a gift of undivided property was contrary to that law, yet, as the donees had obtained possession, the gift was not absolutely invalid.

The High Court held as follows :—

"In this case the claim of the plaintiff to a daughter's share in the estate left by her father, Zahir-ud-din, is resisted on the ground of a deed of gift executed by him, a somewhat weak person, in favour of the appellants, his sons, in 1864. Another son was born to him after that date, so that the effect of the deed is to exclude from inheritance, for no sufficient apparent cause, the younger son as well as several daughters. The Court of First Instance, holding the deed to be valid, dismissed the claim. The Lower Appellate Court considered the deed to be invalid for three reasons : (1) that the property, the subject of the gift, being capable of partition, had not been divided between the two donees ; (2) that part of it was not at the time of the execution of the deed in the possession of the donor himself ; and (3) could not therefore be transferred by him to them. As to the other portion of the property, which was admittedly in his possession at that time, the Lower Courts have not enquired or found, so carefully as they should have done, whether the deed took effect before Zahir-ud-din's death. If it operated immediately in respect of the property on the north side of the River Ravi, and the opinion of the Lower Courts seems to lean to this view, which is also supported by good *primâ facie* evidence, we should not be able to allow that it had failed to operate in respect of the property on the south side of the same river. The latter portion of the property was in the charge of a trustee, who was bound to pay out of its profits the whole of the revenue assessed on both portions. The person or persons in possession of the northern portion could scarcely be deemed to be out of possession of, and not to derive any benefit from the other portion which paid the revenue due from him or them. At all events the donor gave to the donees such possession as he himself had, and could give, of the southern

portion. But, although the soundness of the 2nd and 3rd reasons of the Judge's decision may be doubted, we are not prepared to say that his first reason is wrong. The general rule of the Mahommedan Law is that anything which is capable of division, when given to two persons, should be divided by the donor at the time of the gift, or immediately subsequent thereto and prior to the delivery to the donees, in order that the objection of confusion may be avoided and full and complete seisin obtained. But it is contended on behalf of the appellants that, although the gift of undivided property is contrary to law, it is not, if the donees have obtained possession of it, absolutely invalid. This contention is supported by the opinion of the two disciples, while it is opposed to that of Hanîfa. But it appears from a passage in the *Durr-ul-Mukhtâr* and a passage in the *Fatâwa-i-Alamgiri*, that in a special case like the present in which one of two donees is an adult, and the other an infant son, a gift of undivided property is absolutely invalid, not merely *fâsid* but *bâtil*. The reason of this rule is explained, and although the rule may, it is intimated, be evaded by a particular device, which is not quite clearly intelligible, there is no pretence that such device was employed by the parties to the deed in question in this case."

"The weight of authority appears then to be in favour of the conclusion at which the Lower Appellate Court has arrived, and that conclusion may be upheld upon the basis of Mahommedan Law. Had it been otherwise, it might have been our duty to consider whether we were bound strictly to apply Mahommedan Law to the case, or to deal with, and dispose of it according to the principles of equity, justice, and good conscience. Without entering upon such a discussion, we may content ourselves with remarking that, as the deed is found to be invalid under Mahommedan Law, justice, equity, and good conscience do not, under the circumstances to which we have adverted, require us to maintain it. Twelve years have not elapsed since it was executed, and the heirs of Zahir-uddin, who might, were he still alive, set it aside as not binding on himself, are fully competent to impugn its validity."

It is somewhat difficult to follow the reasoning in the latter portion of the judgment, and it would seem that the reason upon which the Hanafî doctrine is founded, has been, to a considerable extent,

missed. There can be no question that the principle owes its origin, as has already been pointed out, to the fear displayed by Hanafi lawyers regarding the enjoyment of a joint undivided property. It is supposed that when a gift is made to *A* (who is *sui juris*) and *B* (a minor living under the guardianship of *A*), the possession of *B* will be so confused as to give rise to disputes. Similarly, when a gift is made jointly to an infant and an adult son, the father would, *quâ* guardian, remain in possession of the infant son's share, whereas the adult son would take possession of the share given to him. The enjoyment of the property consequently by the two donees would be likely to create confusion, not only among themselves but also among them and the donor. And this confusion and difficulty would be enhanced, in case there happened to be creditors of the father, who alleged that the gift was in fraud upon them. Looked at from this point of view, it would appear extremely probable the principle was originally framed, partly with the object of protecting creditors and partly with the object of avoiding all question, on the part of the donor or his representatives, as to the completeness of the transaction. The donee takes under an act of bounty or mere *taburru* (تبرع). As a mere volunteer, his title to the gift is not perfected, until the donor has completely manifested his intention to vest the property in him.[1] This intention is evidenced by his placing the donee in possession of the subject of the gift or by authorising him to take possession of it, and by so differentiating it from his other properties or those belonging to his co-sharers, as to leave no room for confusion. Until this is done there is no *Kabz-i-kâmil* and the gift is a mere inchoate act of bounty. If the donee is an infant, the necessary possession should be delivered to his guardian. But if there are no creditors, for whose debts such property would be liable, and if possession has been taken and held under the gift, it would not be invalid. And it must be borne in mind that in this country, in relation to the gift of landed properties, the law respecting mutation of names and other statutory provisions, for evidencing a *bonâ fide* transfer

Gift to an infant and adult jointly.

[1] Comp. *Kekewich* v. *Manning*, 1 De G., M & G., p. 176.

In the case of *Wajit Ali* v. *Abdool Ali* (Weekly Rep. 1864, p. 121), the Calcutta High Court held that the rule of *Mushâa* does not apply to a gift by a father to a minor son.

of property, affords a sufficient guarantee against any apprehension of mere *benami* transactions.

That the developed Hanafi Law itself disapproves of the strictness of the rule, is amply shown by the following device pointed out by the jurists to escape from the operation of the principle of *shuyuû*.

"But if the gift be to one adult and one minor, the latter being in the *parwarish* of the former, or to two sons, one adult and one minor, it is not valid, for possession on behalf of the minor could be taken by his guardian." "However," continues the *Radd*, "there is a device by which a gift jointly to an adult and a minor may be made validly, *viz., the entire property may be consigned to the adult, and then a gift of it may be made to both. In such a case, the adult donee would be a trustee for the minor, and possession being already vested in him as depositary, the objection of shuyuû would not apply as to the gift of the share of the minor.*"[1]

Mode of making a valid gift to an adult and a minor.

"If a man make a gift of ten *dirhems* as *sadkah* or pious offering to two indigent people, that is, an offering in the way of God; and as the path of truth is but one, such a gift is not bad for *shuyuû*." A *sadkah* for two rich people is *hiba*, and, therefore, if there is *shuyuû* in the subject-matter thereof, the gift will not take effect until partition is made.

Objection of *shuyuû* only renders gift *invalid*.

In a gift by way of a charity no *shuyuû*.

The objection of shuyuû only renders the gift invalid, but not void. There is considerable difference between a *hiba* which is *bâtil*, that is, null and void, and a *hiba* which is *fâsid* or *ghair mukammull*, which is not complete or merely invalid. According to the *Bazâzia*, an invalid gift is validated by possession and decisions are passed according to this doctrine, and not the doctrine in the *Imâdia*. Accordingly, if a gift is to two individuals, possession taken by both removes its invalidity. In a gift of *mushâa* which is partible if division is affected by the donees though subsequent to the donation it is valid.[2]

A gift of a moiety of a house (which otherwise would be bad for *mushâa*) may validly be effected in this way (according to the *Bazâzia*), that is, the donor should sell it first at a fixed price, and then absolve the debtor of the debt, that is, the price.[3]

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[1] *Radd-ul-Muhtâr*, Vol. IV, p. 783. [2] *Ibid.* [3] *Ibid.*

Shuyuâ or confusion, in order to render a gift invalid must exist at the time of the gift, and not be supervenient, and it must be such as is recognized by the law.[1]

If a man has two dirhems and says to a person that he has made a gift to the latter of one of them, in that case if both are alike in weight and purity, the gift is not valid, but if they are both not alike then it is valid; for, in the latter case, the *shuyuâ* cannot be removed by division. In the same way it would be valid were he to give one-third of the two dirhems.

When a choice of one of two things is given to the donee, if the election is made at a time when it is possible to express the meaning with distinctness, it would be valid. For example, if a man were to say to another, "take one of these two pieces of cloth and let the other be for thy son;" in that case, if the donee exercises his choice before either he or the donor has left the *majlis* (the place where the *akd* or obligation is made), the gift would be valid.

If a man owe another two things, one cash and the other flocks, and the creditor were to say to the debtor, "I give you one of the *mâls* (properties)," it would be valid.

The objection of indefiniteness carried to an extreme would oftentimes prevent the donee or donees from availing themselves of the power to take possession of the property, and thus imparting to the act of gift that validity which was wanting to it initially. In order to obviate the difficulty arising from such a contingency, the Arabian lawyers have devised the doctrine of *tahlil*, which literally means "rendering lawful," but which, with reference to the subject under review, means the *legalisation* on the part of the donor, of the enjoyment of the subject-matter of the gift by the donee and thus rendering it a valid donation. The following examples will throw sufficient light on this branch of the law relating to gifts.[2]

If a person were to say to another, "Whatever of my property thou hast eaten, it is lawful for thee," it would be lawful for him to do so, but should there be any indication of dispute, he should not do so; so it is stated in the *Multeka*.

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[1] *Radd-ul-Muhtâr*, Vol, IV, p. 783. [2] *Fatâwa-i-Alamgiri*, IV, p. 531.

On the subject of *mushâa* there is considerable difference on some points between the *Radd-ul-Muhtâr* and the *Alamgiri*, but the expositions contained in the former are recognised as law.

The doctrine of *Tahlil.*

If a person were to say to another, "Whoever has eaten out of my property, it is lawful for him," the *Fatwa* is that is lawful; as stated in the *Sirâjia.*

In a tradition reported by *Ibn Makâtil*, it is declared to be lawful for every person whether rich or poor to eat of the fruits of a tree, when the owner has said, "it is lawful for all persons to eat of my tree;" so in the *Fatâwa-ul-Itâbia.*

If a person were to say to another, "Make it lawful for me all the rights which thou possessest against me," and he does so and discharges the speaker; in that case, if the owner of the rights was aware of his rights, then the speaker will be legally and conscientiously discharged. If, however, the *Sâhib-i-hukk* was not aware of his rights, the speaker will be discharged only legally. But Abû Yusuf holds that he will be discharged in conscience also; and the *Fatwa* is on this; so in the *Khulâsa.*

If a person were to give to another something which the latter mixes with his own goods, and believing fully that he would not be able to distinguish it from them, he asks the giver of the thing to make it lawful on him and he does so, it is lawful. But if he subsequently finds it, he must return it; so in the *Kinia.*

If a person were to say to another, "It is lawful for thee to take from my property whatever thou findest and whatever thou likest," according to Abû Yusuf this is restricted to *dirhems and dinars.* Therefore it will not be lawful for him to take lands or trees or almonds or cow or goat; so in the *Bahîria* and *Khulâsa.*

If a person were to declare that he had made it lawful for another to eat of his *mâl;* and the latter person does not know it,—in such a case, if he were to eat it it would not be lawful, and it is stated in the *Muhît-i-Sarakhsi* and in *Tâtâr Khânièh* that it is not lawful for him to eat thereof, until he knew of the permission.

One man is a debtor of another, who is not aware of the amount of the debt; and the debtor says to him "discharge me from what I owe thee;" and he replies, "I discharge thee in both worlds;" the jurist Nasîr says that the debtor will be discharged only to the extent of the amount which the creditor believed the debtor owed him. But Mohammed Ibn Sulma says that he will be discharged to the full extent of his debt; and the Fakih Abu'l Lais and others say that what Ibn Sulma has said is the decision of the *Kâzi*, and the

saying of Nasîr has reference to the future world, so in the *Zakhîra*.

If a man were to say to another, "It is lawful for thee what thou hast eaten of my property, or taken or given." In such a case, the eating is lawful, but not the taking or giving; so in the *Sirâj-ul-Wahâj*.

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If a person turn loose a sick animal, saying, that whoever should take and use it, it would become his; and suppose another man does take and use the beast, it would become lawfully his property. This is the *dictum* of Abu'l Kasim.

If a domesticated bird is let loose, it is in the position of a sick animal.

If a person were to usurp a piece of property and the rightful owner were to say, "I have made all my rights *halal* to him," the jurists of Balkh hold, that in this case the usurper is absolved from the liability of damages and not from the restoration of the specific property; so in *Kinia*. It is reported from Mohammed, however, that if one is liable to another for some property, and the owner says, "I have made it *halal* for thee," it is a *hiba*; but if he had said *tahlîl*, it would be a discharge; so in *Zakhîra*.

If a person were to say "I have made lawful (my debts) to all my debtors." This will be a discharge to the debtors, but not to a lessee; so in the *Khulâsa*.

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If a man were to say to his agent *(vakil)*, it is lawful for thee to "eat" of my property from one dirhem to a hundred dirhems, it will not be lawful to the *vakil* to take at once a hundred or fifty dirhems, but only so much as is reasonably necessary for his maintenance: so in the *Multeka*.

SECTION IV.

MUSHAA AND SEISIN ACCORDING TO THE SHIAH DOCTRINES.

According to the Shiahs, the gift of *mushâa* or a share in joint and undivided property is lawful,[1] "and seisin of it is to be taken," adds the *Sharâya*, "in the same way as seisin in sale."

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[1] *Mirza Kasim Ali* v. *Mirza Mohammed Hassan*, 5 Sel. Reports, 218.

that is, "by mere surrender or vacating by the donor." The character of the seisin, as stated before, when dealing with the Hanafî Law, must depend on the nature of the thing given. And the same view is laid down by the Allâmah in his *Tahrîr-ul-Ahkâm*. Mere surrender or delivery of symbolical possession is sufficient in all cases of gift, where the subject is immoveable; where it is moveable, manual or physical possession seems to be required so far *as the nature of the article permits*. Authority to take possession is equivalent to delivery of possession.

Under the Shiah Law there is no question, that if a thing is given to two persons *jointly*, and they take possession *jointly*, each donee becomes the proprietor of the portion given to him. If, again, one only of them should accept the gift and take possession while the other refuses, the gift to the acceptor is valid.

As under the Hanafî Law, acceptance is a necessary condition to the validity of a gift. "The contract of *hiba*," says the *Sharâya*, "requires declaration and acceptance with seisin or taking possession."

Declaration is the expression of an intention or wish on the part of the donor to transfer to the donee the right of property by way of a *hiba*. But the contract is not valid, unless the person who makes the transfer is "of full age, sound understanding and unrestrained in the use of his property," in other words, is *sui juris*, capable of understanding the nature of his act, and does not labour under any inhibition.

A discharge or release given by the creditor to his debtor is equivalent to the gift of the debt, and this is valid both under the Sunni and the Shiah Law. Owing, however, to the difficulty of obtaining physical or actual possession of a debt or *chose in action*, some Shiah lawyers, among them the author of the *Sharâya*, have held that a debt, or rather the right to recover a debt, cannot be assigned to a third person. Other jurists, especially the Shaikh, (the author of the *Mabsût*,) have held the contrary view, and there can be no question that upon the basis of correct analogy, and the recognized practice, which has obtained for centuries among Shiah communities, of making valid assignments of *choses in action*, a debt or a right depending on the obligation of another may be validly given or assigned by the obligee or creditor to a third

party gratuitously, without any consideration, that is, by way of *hiba*.[1] In the case of *Nawab Amjad Ali Khan* v. *Mohamdi Begum*, the gift was of Government Promissory notes. Considered analytically, the gift of the notes amounted in fact to a gift of the right to receive the interest on the money, for which the notes formed the securities. Though the parties were Shiahs, there was no question raised in that case, that such a gift was invalid, because it was the gift of a right to receive the periodically accruing interest. The only ground upon which the gift was impugned was, that the donor had reserved a life-interest in the income, and that such reservation was invalid under the Mahommedan Law. As already explained, the assignment of a *chose in action*, or a right in reversion is as valid under the Shiah as under the Hanafi Law.

According to the Shaikh and the authors of the *Sarâir*, *Ghunia*, *&c.*, seisin may be either actual or constructive.

Release of a debt.

According to the author of the *Sharâya* and his disciples, who belong to the literal school of interpretation, a release or discharge does not require, for effectuation, the acceptance of the donee; whilst the progressive school, represented by the Shaikh, Ibn-Zuhra, Shaikh Murteza and others, hold with the Hanafis that the assent of the debtor or the obligor is necessary to the validity of the discharge. And this view seems conformable to the rules of equity. A discharge is a mere declaration on the part of the creditor of his intention not to enforce the obligation against the obligor. But the expression of an intention not to enforce a liability, which may have the effect of precluding the creditor from enforcing his claim, would not necessarily preclude the debtor from insisting upon the creditor to accept the payment of the debt. Obligation has been defined by

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[1] Under the English Common Law, the benefit of a contract cannot be assigned (except by the Crown), so as to enable the assignee to sue in his own name. The origin of this restriction was attributed by Coke to a desire on the part of the founders of the English Law to discourage maintenance and litigation; "but," says Pollock, "there can be little doubt that it was in truth a logical consequence of the primitive view of a contract as creating a strictly personal obligation between the creditor and the debtor." Pollock on Contracts, p. 224.

The view held by some of the Shiah lawyers against the transfer of *choses in action* or assignment of contracts may also be said to be a logical consequence of their view regarding the principle of seisin.

an English writer to mean the relation that exists between two persons, of whom one has a private and peculiar right to control the other's actions, by calling upon him to do or forbear some particular thing.[1] The same definition may be applied to the term *akd* of the Arabian jurists. It implies a relation which, whilst giving a certain right to one person over another, often creates a corresponding liability against him in favour of that other. Proceeding upon the basis of this conception, the Hanafî jurists have held that the "gift" of a debt, *i.e.*, the release of it, to the debtor is complete without his acceptance, though it is reversed by his rejection: but this is correct only with respect to the principal debtor, for the gift of a debt to the surety is not complete without his acceptance, though it is reversed by his rejection. If the creditor releases the principal debtor from his debt, or gives it to him and he accepts, both he and the surety are released, but if he do not accept he is not released.[2] This principle is enunciated with great clearness in the *Jawâhir* as well as the *Ghunia*.[3]

[1] Pollock, p. 3.

[2] *Fatâwa-i-Alamgiri*, IV, pp. 535, 536.

[3] See *post*, p. 145.

CHAPTER II.

FORMALITIES RELATIVE TO GIFTS.

SECTION I.

Formalities relative to gifts.

GIFTS, under the Mahommedan Law, are not subjected to any formality, or any special publicity; they can be made either verbally or in writing. But, when a gift of immoveable property is made in writing in India, the provisions of the Indian Stamp and Registration Acts have to be complied with.

In order to create a gift, it is not necessary to make use of any express terms. Even where the declaration and acceptance are not expressed in words, so long as the intention is evidenced by conduct it would be sufficient.[1] If the gift is made in writing or verbally, any word by which it may be presumed that the donor intended to give the substance of the thing, would convey the property in the thing itself. Intention, as gathered from attendant circumstances, must, in cases of doubt, furnish the governing principle. In short, if from the words used it can be inferred that the proprietary right in the *substance* of any object was intended to be conveyed that would be a gift. If, however, it appear that what the donor intended to give was only the *munâfaa* or the usufruct, under the Hanafi Law, it would be an *aâriat* (commodate loan).[2]

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[1] هوالايجاب وفي خزانة الفتاوي اذا دفع لابنه مثلا فتصرف فيه الابن يكون للاب الا اذا دلت دلالة التمليك بيوي قلت فقد افاد ان التلفظ بالايجاب والقبول لا يشترط بل تكفي القرائن الدالة على التمليك كمن دفع لفقير شيئا وقبضه ولم يتلفظ واحد من هما بشيء وكذا يقع في الهدية ونحوها * *Radd-ul-Muhtâr*, IV, p. 377. والاصل في هذه المسائل انه اذا اتى بلفظ ينبئ عن تمليك الرقبة يكون هبة واذا كان منبئا عن تمليك المنفعة يكون عارية اذا احتمل هذا وذلك ينوي فيه ذالك كذافي المستفكى شرح الذافع*

[2] *Fatâwa-i-Alamgiri*, IV, p. 521.

If a man were to give *dinars* to his wife to spend on clothes to wear before him, and she employs them in trade, the profit arising therefrom as well as the money itself would be her property.[1] Clothes for children become their property, but not those made for apprentices or servants.

Conditions necessary for the validity of a gift.

As regards the conditions necessary for the validity of the act of gift, they are the following :—

(1) Declaration expressed in any language which conveys the meaning, or expressed by conduct.

(2) Acceptance, expressed or implied.[2]

(3) And seisin by the donee of the subject of the gift, *i.e.*, if the property is not already in the hands of the donee.

The *Hedâya* states the principle thus :—

Seisin under Mahommedan Law.

"Gifts are rendered valid by tender, acceptance and seisin. Tender and acceptance are necessary, because a gift is a contract, and tender and acceptance are requisite in the formation of all contracts, and seisin is necessary in order to establish a right of property in the gift ; because a right of property according to our doctors is not established in the thing given merely by means of the contract without seisin.—Mâlik alleges that right of property is established in a gift antecedent to seisin, because of its analogous resemblance to a sale and the same difference of opinion obtains with respect to *sadkah*.—The arguments of our doctors upon this point are twofold. First, the Prophet has said, "A gift is not valid without seisin" (meaning that the right of property is not established in a gift until after seisin). Secondly, gifts are voluntary deeds, and if the right of property were established in them previous to the seisin, it would follow that the delivery would be incumbent on the voluntary agent before he had voluntarily engaged for it. It is otherwise, with respect to wills, because the time of establishment of a right of property in a legacy is at the death of the testator, and he is then in a situation which precludes the possibility of rendering anything binding upon himself."[3]

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[1] *Fatâwa-i-Alamgiri*, IV, p. 52.

[2] If a man give a thing to another, saying, "I give this to thee," and the donee take possession of it without saying a word, it is valid.—*Radd-ul-Muhtâr*, IV, p. 781.

[3] *Hed.* III, p. 291.

In the case of *Nunda Sing* v. *Meer Jaffer Shah*,[1] it was held that a gift depends upon tender and acceptance, but seisin is necessary to make it complete. To some extent the later decisions have overlooked the exact bearing of the question of seisin on the validity of a gift under the Mahommedan Law. It has been supposed sometimes, that actual delivery or transfer of possession is intended by the condition which makes delivery of seisin a condition to the validity of a gift.[2] In this view it becomes necessary to ascertain the exact meaning of the term *Ikbâz* or seisin under the Mahommedan Law. It must be admitted that unless *Ikbâz* (constructive or actual) can be presumed in the donee after the gift, it will not be operative. But a full consideration of the dicta on the subject shows that actual delivery of possession is not necessary. If the character of the possession changes, the mere retention of the subject-matter of the gift in the hands of the donor, would not affect the validity of the gift. He may continue to retain the possession of the property as a trustee or depositary, and such possession will not affect the legality of the transfer.[3] Similarly, if the thing given be in the hands of the donee in virtue of a trust, the gift is in that case complete, although there be no formal seisin, since the actual article is already in the donee's hands whence his seisin is not requisite. "It is otherwise where a depositor sells the deposit to his trustee, for in this case the original seisin does not suffice, because seisin in virtue of purchase is a seisin inducing responsibility, and therefore cannot be substituted by a seisin in virtue of a trust, but seisin in virtue of a gift on the contrary, as not being a seisin inducing responsibility, may be substituted by a seisin in virtue of a trust." The law in cases of gifts to minors looks to the intention of the donor. When there is on the part of a father or other guardian, a real *bonâ fide* intention to make a gift, transmutation of possession is not necessary, the subsequent holding of the property by the donor being considered to be on behalf of the minor. This principle was laid down with considerable distinctness in the case of *Abedunnissa Khatoon* v. *Ameerunnissa Khatoon*, where the Privy Council dealing with the question held that, under the Mahommedan Law, when there is on the part of a father

[1] 1 Sel. Reports, p. 5. [2] 16 W. R., 188.

[3] *Radd-ul-Muhtâr*, Vol. IV, p. 785; *Majmaa-ul-Anhar; Hed.* III, p. 295.

or other guardian a real and *bonâ fide* intention to make a gift, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor donee.[1]

Ability to take possession is sufficient in many instances to validate the act of donation.

According to Kâzi Khân, the ability of the donee, if adult, or of his guardian if a minor, to take possession of the gift,—in other words, to exercise the right of property over it, is sufficient to validate the act of donation. Accordingly where a gift is made, and a direction is given to the donees to take possession of the subject of the gift and partition it among themselves, such a gift is held to be valid.[2] Power to take possession is equivalent in certain instances to actual delivery of possession. The meaning of this is, where the the donor places the donee in a position to exercise the right of property over the subject of the gift, it is tantamount to delivery of seisin. For example, if *A* make a gift of his horse which is in his stables to *B* and give to *B* the key of the place, and authorize him to take possession of it, the seisin is sufficient in law.[3]

But the possession of the donee must be with the permission of the donee. "If the donee," says the *Hedâya*,[4] "take possession of the gift in the meeting of the contract of gift, without the order of the giver, it is lawful upon a favourable construction. If, on the contrary, he should take possession of the gift after the breaking up of the meeting, it is not lawful unless he have had the consent of the giver so to do. Analogy would suggest that the seisin is not valid in either case, as it is an act with respect to what is still the property of the giver, for as his right of property continues in force until seisin, that is consequently invalid without his consent. The reason for a more favourable construction of the law in the instance in question is that seisin in a case of gift is similar to acceptance in sale, on this consideration that in the one the effect of the deed (that is, the establishment of a right of property) rests upon the seisin and in the other upon the acceptance. As, moreover, the object of a gift is the establishment of a right of property, *it follows that the tender of the giver is virtually an empowerment of the donee to take possession.* It is

[1] *Ameerunnissa Khatoon* v. *Abedoonnissa Khatoon*, L. R., 2 Ind. App., 87.

[2] *Fatâwa-i-Kâzi Khân*, p. 282. [3] *Majmaa-ul-Anhar.*

[4] *Hed.* III, p. 292.

otherwise where the seisin is made after the breaking up of the meeting, because our doctors do not admit of the establishment of the power over the thing, but when seisin is immediately conjoined with acceptance and as the validity of acceptance is particularly restricted to the place of the meeting, so also is the thing which is conjoined with it. It is also otherwise where the giver prohibits the donee from taking possession in the place of meeting, for in that case the seisin of the donee in the place of the meeting would be invalid, as arguments of implied intention cannot be put in competition with express declaration."

In fact, the legal effect of a gift is not complete until transmutation of possession has taken place, and in this respect a stranger and the child of the donor are on the same footing when the child is adult.[1] But the possession of the donee must be with the permission of the donor. It is not necessary, however, that the permission should be express. If the permission, or, in other words, the consent of the donor to the taking of possession can be inferred by conduct, it is sufficient. If the possession is taken immediately after the gift there can be no question as to the validity of the gift, but if after the gift the donor prohibits the donee to take possession, and if the donee nevertheless takes possession, it is not valid. Where a gift is made to two persons in succession, and is followed by possession to the second, the second gift is valid.

But the question of possession has such a practical importance in the discussion of cases arising under the Mahommedan Law relating to dispositions of property, that an elucidation of the meaning attached to the word seisin, or its Arabic equivalent *kabz*, is of the utmost importance. The question came up for decision in the Bombay High Court in the case of *Amina Bibi* v. *Khatija Bibi*.[2]

In that case a husband had made a gift of his house and certain tenanted out-offices, &c., to his wife. He had made over the keys to his wife, left the house for a few days (to accentuate the fact of delivering possession), but had returned afterwards and lived with her in the same house until his death. During his lifetime he had

[1] I. L., 9 Bom., 146; I. L., 3 All., 731; I. L., 5 Bom., 238.

[2] 1 Bombay High Court Reports, 1, p. 157.

I give the judgment *in extenso*, as it is in every respect one of the most valuable decisions concerning the question of possession under Mahommedan Law.

collected the rents of the out-offices presumably on behalf of the wife. In a suit by his heirs against the widow to set aside the *hiba* on the ground that no possession had passed, Sausse, C. J., said as follows :—

"The acts essential for giving validity to a *hiba* or gift according to Mahommedan Law are tender, acceptance and seisin, but the manner in which seisin is to be effected must be considerably modified to suit the peculiar relations recognised as existing between husband and wife in the Mahommedan Law. The property of each is separate and independent of the other; either can make, and both are encouraged by law to make, gifts to the other in order to promote mutual affection; and so strongly is this principle inculcated that retractation of such a gift is not allowed, although in many other cases it is lawful. A wife can make to her husband a valid gift of the house in which both are residing, although it contain her separate property, and though both continue to reside in it afterwards. Upon principle, I do not see why a husband should not equally be at liberty to bestow upon his wife the house in which both are living,[1] and in which they afterwards continue to reside, provided he have power to make the gift, and do make it *bona fide*, and not in contemplation of fraud upon creditors or others. The only difficulty is to comply with the exigency of the law, which requires 'seisin' or exclusive possession to be given. If a husband with full power to give executes a deed of gift, and in accordance with its provisions hands over symbolical possession of a house or property by keys, &c., and also, to mark more strongly the *bonâ fides* of the intention, actually goes out of the house before witnesses in order to leave it, and all within it in the full and exclusive possession of his wife, I do not see what further act he could do to give effect to that gift consistently with exercising his other legal rights as a husband. The wife had at that time the power afforded to her of taking and keeping exclusive possession of the gift, and of continuing to reside in the house, but the Mahommedan Law gives the husband the right, and moreover makes it his duty, to reside with his wife. If, then, such a clear

[1] As a matter of fact it is distinctly laid down in *Kâzi Khân* and the *Radd-ul-Muhtâr* that the husband may make such a gift.

expression of intention as is contained in the present *hiba*, accompanied by such an unequivocal act before witnesses, be not held to give that seisin which is required by Mahommedan Law, it would amount to introducing a restriction as to the object of 'gift,' which is not found, so far as I have been able to learn, in any Mahommedan law-book. The husband has a general power of making a gift to his wife, but were the present *hiba* to be held to be invalid, it would amount to declaring that a husband shall not under any circumstance make a gift to his wife of the house in which they are at the time residing, and in which they continue to reside down to his death. If such a restriction be unknown to Mahommedan Law, there must be some legal mode of effecting the gift of such a property of the husband's. The circumstance of possession once given being subsequently continued does not appear to be a necessary condition of a *complete seisin*, or its non-continuance to invalidate the *hiba*. See the case of *Jaffer Khan* v. *Hubshee Beebee*, 1 S. D. A. Rep. of Bengal, p. 12, referred to in Morley's Digest, Title 'Gift,' s. 55."

"The 'seisin' of the Mahommedan Law appears to be analogous to our livery of 'seisin' as formerly existing in England, and to have been effected much in the same way as by delivery of a sod or twig of the land, or the ring or hasp of a door, in the name of 'seisin.' In Coke on Littleton, 57*a*, it is laid down—'If the deed be delivered in the name of 'seisin' of the land, or if the feoffor (or donor) saith to the feoffee (or donee) take and enjoy this land according to the deed, or enter into this land and God give you joy,' these words do amount to a livery of 'seisin.'"

"Two passages from the *Tohfa*, Vol. IV, pp. 59 and 335, have been relied upon by the defendant to show that a delivery and acceptance of keys of a house is a sufficient seisin or giving of possession in a case of sale and purchase, and also that gifts are in that respect to be treated as sales :—'The giving of the possession of immoveable property to the purchaser depends upon the words expressed by the seller conveying the meaning that (the house) has been vacated, and in handing over the keys of the house,' *Tohfa*, Vol. IV, p. 59 ; and 'The thing of which a 'gift' has been made does not become the property (of the donee) without possession, as is the case with things that are sold, and the declaration of a donor

to the effect that he has given possession is sufficient to denote (real) possession ;' *ib.*, p. 335."

"In the present case the deed of gift was delivered, and with it the keys of the houses and furniture mentioned in the *hiba*, which included the house in which the husband and wife were then living.[1] No words can be stronger than those contained in this *hiba* to indicate the intention of the donor to complete the gift according to law ;—'And I having given up my possession have given them (the houses and *chal*) into the possession of the above-mentioned woman (his wife), in whose favour the gift is made, and all the conditions respecting a gift, *viz.*, the mutual consent and the taking possession in every way, together with the vacating of them, have been performed by me and the above-mentioned woman in whose favour the gift is made ;' and again, 'In future I have no claim to the property, nor can any of my heirs demand anything out of the above-mentioned property by way of inheritance.'"

"In my opinion, the relation of husband and wife, and his legal right to reside with her and to manage her property, rebut the inference, which, in the case of parties standing in a different relation, would arise from a continued residence in the house after the making of the *hiba*, and in the husband generally receiving the rents of the *chal* annexed to that house. It is also worthy of remark, that the husband mentioned to some tenants that he was receiving rent on account of his wife, to whom he had made a *hiba*."

"This is not a case of creditors claiming against a *hiba* set up to defeat their claims, but it is that of heirs or next of kin claiming in derogation of the gift of the person through whom they claim."

The same principle was laid down in *H. H. Azimunnissa* v. *Clement Dale*.[2] In that case it appeared that the Nawab of Carnatic had made a gift of certain houses and gardens to his Begum (H. H. Azimunnissa) but had continued to reside in the houses as before, and to deal with the property as his own. Bittleston, J., held that the gifts were valid and conveyed a good title to the donee.

So in *Emma Bai and others* v. *Hajira Bai*[3] Sargent, C. J., following the views expressed by Sausse, C. J., in *Amina Bibi* v.

[1] According to the *Majmaa-ul-Anhar* and the *Fath-ul-Kadîr* this would be sufficient delivery of seisin.

[2] 6 Mad. High Court Reports, 458.

[3] I L., 13 Bom., 352.

Khatija Bibi held that where a gift was made by a husband to his wife, it would not be invalid even if he continued in reception of the rents and profits after the date of gift, if it could be inferred that he was doing so as his wife's manager.

In the case of *Jaffer Khan* v. *Hubshi Bibi*[1] it was held that where the technical requirement of delivery of seisin is complied with, continued possession is not necessary.

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The question whether for the purpose of completing a gift of immoveable property by delivery and possession, a formal entry or actual physical taking of possession is necessary, was also discussed before West and Nanabhai Haridas, JJ., in the case of *Shaikh Ibrahim* v. *Shaikh Suliman*.[2] Mr. Justice West laid down the principle of the Mahommedan Law on the question of seisin with considerable distinctness. His Lordship said :—

"As to the law of the case, the Courts below are to bear in mind that when land is occupied by tenants a request to them to attorn to the donee is the only possession that the donor can give of the land in order to complete a proposed gift. Such a possession would, according to the case of *Khajooroonissa* v. *Rowshun Jehan* be sufficient. As to the delivery of the house, the principle is to be borne in mind that when a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession. He occupies a certain part, and this occupation becoming actual possession by the will of the parties extends to the whole, which is in immediate connection with such part where the possession is rightfully, though not where it is wrongfully taken, *ex parte Fletcher*. An appropriate intention where two are present on the same premises, may put the one out as well as the other into possession without any actual physical departure or formal entry, and effect is to be given as far as possible to the purpose of an owner whose intention to transfer has been unequivocally manifested."[3] This is in accordance with the principle stated in the *Majmaa-ul-Anhar*.

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[1] Sel. Reports, I., p. 12.

[2] I. L. R., 9 Bom., p. 146, wherein the cases bearing on this point are referred to.

[3] In a case among Hindus, *Kalidas Mullick* v. *Kanhyalal Pundit*, I. L. R., 11 Cal., p. 121, the Privy Council had occasion to refer to the principle, which it is

When possession is already with the donee it need not be renewed; no formal transfer therefore is necessary, when the gift is to a depositary, bailee or trustee who is already in possession of the property which forms the subject-matter of the gift.[1] In the case of *Vilayet Hussain* v. *Maniran*,[2] the Calcutta High Court held, that when the subject of the gift has been in the hands of the donee as manager or agent of the donor, such possession by the donee was not sufficient to make it unnecessary to the validity of the gift that there should be actual or formal delivery of possession of the property. In this case the gift was made in death-illness. This case is clearly opposed to the Mahommedan Law.

Section II.

Gifts to Minors.

Gifts to minors.

In the case of a gift by a father to his minor child, no acceptance is necessary: "the gift is completed by the contract, and it makes no difference whether the subject of the gift is in the hands of the father or in that of a depositary [on behalf of the father."] If a father make a gift of something to his infant son, the infant, in virtue of the gift, becomes proprietor of the same, provided the thing given be at the time in the possession either of the father or

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submitted ought to be carefully borne in mind in dealing with the subject of gifts among the Mahommedans. Dealing first with the question what interest is conveyed to the donee when the terms of the gift are indefinite, their Lordships said: "It appears to their Lordships that the indefinite words of a gift must be limited by the purpose of the gift, and that it was Romasunderi's intention that Ruttonmoni should take the property only for her life."

With reference to the validity or invalidity of the gift on the basis of non-possession, their Lordships used the following language:—"A gift where the donor supports it, the person who disputes it claiming adversely to both donor and donee is not invalid, for the mere reason that the donor has not delivered possession, and that where a donee or vendee is under the terms of the gift or sale entitled to possession, there is no reason why such gift or sale though not accompanied by possession, whether of moveable or immoveable property (where the gift or sale is not of such a nature as would make the giving effect to it to be contrary to public policy) should not operate to give the donee or vendee a right to obtain possession." This principle is exactly applicable to the Mahommedan Law.

[1] *Hed.* (Eng. Tr.), III, 295; *Radd-ul-Muhtâr*, IV, p. 783.

[2] 5 Cal. L. R., 91.

of any person who stands in the position of a trustee for the father, because the possession of the father is tantamount to the possession of the infant by virtue of the gift, and the possession of the trustee is equivalent to that of the father. Accordingly, the father may make a gift to his minor child of immoveable property in the occupation of tenants or in the possession of a lessee or mortgagee without any change of possession on the part of the persons directly holding the subject-matter of the gift. Nor, to make the gift complete, is any acceptance on the part of the donee necessary. The gift once made and the intention to convey the property unequivocally expressed, the donation is complete so far as the donor is concerned, though he may continue to hold the property in his own name in the same manner as before the gift.

The same rule applies to a gift by a mother to her infant child, whom she maintains and whose father is dead and there is no constituted guardian; and so also with respect to the gift of any other person maintaining a child under similar circumstances. "The law with respect to seisin in cases of *sadkah* or pious gifts is similar to that in gifts."

This means that "a gift by way of a pious offering" stands in the same position as a simple gift or voluntary settlement so far as the question of seisin in concerned. Among Mussulmans, it is very frequent, or, perhaps, more correctly speaking it used to be so, to make donations to children and relations by way of a pious offering or *sadkah* "to obtain the nearness of God"—to deserve the Almighty's reward. This recompense is regarded in the Mussulman Law as a meritorious consideration and barred the claims of creditors. But when a gift of this kind was made, delivery of seisin was to be effected in the same way as in the case of a gratuitous gift. If the donee was in possession of the subject-matter of the gift from before the donation, he became proprietor thereof "without the necessity of a new seisin." In the same way if the father made a pious gift to his infant child of a thing in his possession or of somebody in his behalf, it is valid without actual delivery of seisin or change of possession.

Where a gift is made to an infant by a person other than the father "the gift is rendered complete by the seisin of the father of the infant."

When the father is dead, the possession of the guardian is sufficient, the primary guardians being either the executor appointed by his father, or his grandfather, or the executor appointed by his grandfather.

If a fatherless child be under the charge of his mother, and she take possession of a gift made to him, it is valid, because she has an authority for the preservation of him and his property, "and the seisin of a gift made to him is in the nature of a preservation of himself since a child cannot subsist without property." The same rule obtains with respect to the validity of the seisin of a non-relative who has the charge of an orphan, *viz.*, that where a gift is made to an orphan who is living in the guardianship of a stranger, if possession is taken by such guardian it would be sufficient in law. The possession of a *de facto* guardian or of a guardian appointed by the Court, even where the father is alive, would be sufficient.

If an infant endowed with understanding or discretion should himself take possession of a thing given to him, it is valid, because such an act is to his advantage, and the law, therefore, presumes in him the capacity of performing it, as capacity depends on reason and understanding which he possesses.

It is lawful for a husband to take possession of a gift made to his wife if she is an infant, provided she has been sent from her father's house to his; and he is authorised to do so even though the father is living, because the father after sending the girl to her husband's house is held by implication to have resigned the management of her concerns to the husband. It is otherwise where she has not been sent from her father's house, because then the father is not supposed to have resigned the management of her concerns. Where the father is alive and on the spot, the mother may not take possession, but it does not follow from this, that if she does, the gift is invalid, though passages in Baillie's paraphrase may convey that impression. What those passages mean is simply this, the father is the best judge of the interests of his infant child. Where he is present, his acceptance of the gift on behalf of the child implies that he considers it to the child's benefit. His acceptance on this ground is primarily required. But it does not follow from the reason of the rule that where a gift is *prima facie* an unburdened bounty the mother may not validly accept it, even against the wishes of the

father.[1] When a gift is made by a father or any other guardian to a minor child, it is not necessary that the donor should divest himself of all interest in the subject-matter of the gift. For example, where a house is bestowed it is not necessary that the donor should not reside therein, or if it contains his effects, that he should remove them from it. And the Privy Council in the case of *Mohamdi Begum* v. *Amjad Ali Khan* applied the principle to the case of gifts in favour of adult persons. A *sadkah* or pious gift to a minor child by the father, whilst the father is living in it, is valid according to Abû Yusuf, and the *fatwa* is with him (that is, decisions are passed in accordance with his doctrine).[2]

Things given in *jahaz* (by way of paraphernalia) to a bride taken to the house of the husband belong to her, unless the father says they were given by way of *aâriat* (commodate loan,) the *onus* being on him to prove his statement; usage will have to be considered in connection with the position of the father.[3]

A gift by the mother to her infant child of her dower-debt due by the father is valid, when the mother invests the child with the power to realise it, in other words, authorises him to recover the debt.[4] As the donation of a gift implies an authority to recover it, the proviso may be regarded as a distinction without a difference.

The above principles may be formulated as follows:—

If a stranger make a gift to an infant, the right of acceptance and possession on behalf of the infant appertains in the first place to the father. If the father is dead, or is at such a distance as to preclude the possibility of his presence, in that case the executor of the father takes the place of the father. If there is no executor of the father, then comes the grandfather, and in his absence the grandfather's executor. Besides these, who may be regarded as guardians *de jure*, any person who happens to be the *de facto* guardian of the infant, that is, in whose custody the child is, may take possession of the subject-matter of the gift.

In the case of *Musst. Banoo Bibi* v. *Fakhrooddeen Hassan*, however, the Sudder Court proceeded further and held, I think correctly on principle, that a deed of gift by a female to a minor, whom *Musst. Banoo Bibi* v. *Fakhrooddeen Hassan.*

[1] *Fatâwa-i-Alamgiri*, IV, p. 526.
[2] *Radd-ul-Muhtâr* throughout.
[3] *Radd-ul-Muhtâr*, Vol. IV., p. 781.
[4] *Ibid.*

she had received into her family as an adopted son, of property of which possession was not delivered at the time of the gift or during the lifetime of the donor, she having retained possession of it on behalf of the minor, to be valid and complete in law notwithstanding that the father of the minor was alive.[1]

If a minor girl be living with her husband after her marriage, a gift of which possession is taken by the father or the husband is equally good.

But before the minor wife has been sent to the husband's house, or after she has attained her majority, the husband is not entitled to take possession. The guardianship in respect of a minor wife vests in the husband when she comes to his house.[2] As long as she has not been sent to his house, he has no right to take possession on her behalf of any gift made to her; when she has come to live with him he becomes her *wali*.

If the father is alive or present, but the child is being brought up by the uncle, grandfather or mother, their possession is sufficient.

If the minor is possessed of understanding, he may take possession of the gift, but in order to prevent any dispute, the Kâzi is authorised to appoint a curator for the same. When the donee is insane, the right to possession belongs to his guardian.

If a gift is made to a *latîk* (foundling), the possession of one who brings up the child, or that of the *hâkim* is sufficient.

An infant who has attained discretion has a right to reject as well as to accept.

It is lawful for parents in case of necessity, (and where it can be shown that it was the intention of the grantor that they should do so,) to make use of a gift made to the child but not to consume it.

Presents to children.

Presents given to a child at circumcision, if suited for him, become gifts to him. If not suited for him they become the property of the parents, according as they are made by the friends or relatives of the father or mother. But if the giver of the gift distinctly specifies at the time that the present is for the child, it is for him.

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[1] Sel. Reports, II, p. 180.

[2] The custody of a minor wife does not belong to the husband, *In re Khatija Bibi*, 5 B. L. R., p. 517, but it is not illegal, *In re Mahia Bibi*, 13 B. L. R., p. 160.

Presents given to a bride follow the same rule, that is, if they are made by the relations of the husband they become the husband's property, unless they are distinctly mentioned to be given to the wife.

Nobody can make a gift of his child's property even for a consideration. This is a natural corollary of the principle which debars guardians from selling the property of a minor, unless under exceptional circumstances.

A youth who has attained discretion but not puberty, may accept a gift even after his *wali* has rejected it.

In the *Fatâwa-i-Kâzi Khân*, it is stated that if a person give a house to his minor child and subsequently purchase or acquire another house with the proceeds of the house of which gift has been made, this latter house will be the property of the child. According to the *Radd-ul-Muhtâr* this is the accepted doctrine. The doctrine, however, when analysed would seem to express, in other words, the principle that when a gift has been made by a father to his child, it becomes the property of the minor though it continues to remain in the possession of the father. And accordingly any dealing with the property by the father *dehors* the right of the infant would not change the character of the gift or destroy the right of the infant.

Section III.

Gifts with Conditions.

Conditional gifts and gifts with conditions.

There is great difference between *conditional gifts* and *gifts with conditions attached to them*. The former are gifts which are made dependent for their operation upon the occurrence of certain contingencies, and are void according to all the schools.[1] Whilst with regard to gifts with conditions attached to them, there exists a certain divergence between the Shiahs and the Hanafis. According to the Hanafi Law, any derogation from the completeness of the gift is null; and if the intention to give to the donee the entire subject-matter of the gift be clear, subsequent conditions derogating from or limiting the extent of the right would be null and void.

[1] *Roushan Jahan* v. *Enaet Hossan*, Weekly Rep., 4, and L. R., 3 I. A., p. 291; *Eusuf Ali* v. *the Collector of Tipperah*, I. L., 9 Cal., p. 138; *Chekkom Rutu* v. *Ahmud*, I. L., 10 Mad., p. 196.

Hanafi Law. Accordingly, under the Hanafi Law, *whilst the gift is valid the condition is void.* Under the Shiah Law, if the condition is subsidiary to the gift, both the gift and the condition are valid. For example, if a man were to say, "I give you the debt due to me by *A*, on condition that you give to *B*, the interest thereon;" under the Hanafi Law the condition is void, but the gift valid. Under the Shiah Law. Shiah Law, if the gift depends on the condition attached, the entire gift is bad. If it does not and the condition is only subsidiary, then both the gift and the condition are valid. In practice (*urf*) there is no difference whether the gift depends on the condition attached, or whether the condition is only subsidiary. In both cases Contingent gifts. both gift and condition are valid. Gifts dependent upon contingencies are void, as stated before, according to both the schools. For example, a condition for the avoidance of a debt in words like the following:—"When to-morrow comes and thou happenest to die, then thou art discharged from my debt," is null and void. Or "shouldest thou die of this disease, this house is thine," in all these cases the gift is absolutely void. But a condition implying an immediate operation of the gift would be valid. For example, if a man were to say to another, "if you owe me any money, I absolve you of it," or "you will be absolved of my debt when I die"[1] (which becomes a legacy).

Hanafi doctrines. If a man were to say to another, "that house is for thee; if thou diest before me it is mine, and if I die before thee it is thine," in the *Nawâdir* it is stated from Abû Hanîfa, that it is a *hiba*, the conditions being void. If a man were to say, "I have made this *rukba*[2] for thee" it is an *aâriat*, that is, the donee shall have the loan of the thing without any disposing power over it, subject to the option of the donor to resume his gift or loan at any time. If a man were to say, "I have made this *rukba* for thee, and it is thine," it is a *hiba*.

Shiah doctrine. Under the Shiah Law every word which indicates the gift of an absolute *proprietary right* is sufficient to constitute a *hiba*.[3]

Hanafi Law. A life-grant or *umra* under the Hanafi Law takes effect as a *hiba*, the condition limiting the gift being held void. A gift to *A*

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[1] *Fatâwa-i-Kâzi Khân*, IV, p. 229. [2] *Ibid.*
[3] *Jâmaa-ush-Shtttât.*

for life and remainder to *B* takes effect as an absolute gift to *A*,—to use an English expression, gives him an estate in fee.

A mere grant of the usufruct of a thing is in the eye of the law, simple *aâriat* or commodate loan which implies on the part of the donee the obligation of returning the selfsame thing.[1]

The Shiah Law recognises the validity of limited estates and deals with the subject under a special chapter.

Temporary grants or limited estates under the Shiah Law.

Temporary grants or limited estates receive different names according to the object with which such grants are made or such estates are created.

(*a.*) *Hubs* signifies literally the tying up of property, technically it means grants limited to a certain time. *Hubs* are acts by which the proprietor confers on another person "gratuitously," that is, without any consideration, the enjoyment of the use or usufruct of a thing with a reservation of the owner's right of property in it. The reciprocal consent of the contracting parties, expressed or implied, with transmutation of possession, suffices to render the contract valid.

(*b.*) "The enjoyment of the use or usufruct created for life,"—in other words, a life-estate, is called *al-umra.*

(*c.*) The enjoyment of the use of a house, without any right of property in it, is called *as-sukna*, "right of habitation."

(*d.*) The enjoyment of the use or usufruct of a thing for a fixed and determinate period is called *ar-rukba.* This word literally signifies *servitude* and is applicable to the condition, which derogates from the completeness of the gift and cuts down an absolute gift to a limited estate.[2]

There is no special formula for effecting such a contract, but it may be made in the following words, such as, "I have granted to such a one the enjoyment of such a house or such a land for his life or for such a time," or in any other words which express the intention of the proprietor. When it is for the life of the grantee, it is also called an *umra.* The execution of the contract becomes

[1] "A mere grant of usufruct is an *adriat* in a thing which can be used without being destroyed, but things which must be consumed in use, imply gift except in the case of money;" *Futâwa-Kâzi Khân*, IV, p. 230.

[2] According to the *Jawâhir* there is no difference so far as the legal effect is concerned between an *umra*, *sukna* or *rukba.*

obligatory after the delivery of the property. The contract by which the enjoyment and use of a house or habitation is conferred upon any one is put an end to by the death of the grantor, unless there is any other period fixed for it.

When a grant is made in these terms, "when you die it will revert to me," the reversion would take effect by the death of the donee.

When the grant of the usufruct is made for a limited and determinate period of time, the contract becomes obligatory at the moment of the delivery of possession, and the proprietor cannot resume the subject-matter of the grant until after the expiration of the term fixed. A grant made for the lifetime of the donor does not terminate upon the death of the donee ; the right passes to his heirs who enjoy the same until the death of the grantor.

A grant of the usufruct without determination of period might be revoked at any time at the will of the grantor.

A limited estate or the grant of the usufruct of some property for a determinate period does not terminate by the sale of the *substance* of the thing ; the grantee has the right of holding possession of the thing given and enjoying the usufruct until after the expiration of the term of the grant. "Of every thing of which a *wakf* is valid, the *umra* or granting for life is valid also, and the grant is not invalidated by the sale of the thing, for the purchaser must fulfil to the life-tenant whatever was conditioned on his behalf."

The right of *sukna* or habitation granted in general terms empowers the grantee to live in the house with his relatives and children ; but he cannot transfer the right to any other person unless there is a special condition to that effect.

A grant of a *sukna* to *A* and his children will give to the grantee and his children, or the survivors, the right of residing in the house until the death of the last surviving child.

A grant limited to the donee and his *wâ-mundigân* (those whom he leaves surviving,) would confer a life-estate on the donee and the persons existing at the time of his death, and will revert to the grantor or his heirs upon the death of the last surviving member of the grantee's family.

The passage in the *Sharâya* that a grant to *A* and his "*akab*" only takes effect as a life-estate, as if the word *akab* was not

mentioned, refers to the case of an *umra*, the author of the *Sharâya* being of opinion that the mention of the word *akab* (which signifies literally 'a person coming after him,') is not like the mention of descendants and therefore does not convey an estate-in-fee, whereas the author of the *Mabsût* is of opinion that a gift to *A* for life and then for his *akab* is tantamount to an absolute gift.

An *umra* and *rukba* for one life and for a limited period to his *wâ-mundigân*[1] (those whom he leaves surviving) is valid, so also an *umra* for several lives in succession.

A *rukba* for an *indeterminate* period is valid, but is resumable at the will of the donor. A sale of the subject of the grant would put an end to the grant.

The grantee cannot let or hire a house or mansion given to him for habitation without the special permission of the grantor.

Shiah Law as to limited estates.

All grants constituted in favour of definite individuals *without specification of time* terminate by the decease of the proprietor or grantor, and become a portion of his inheritance. A grant to *A* in these terms, "if you die before me, the property will revert to me, if I die before you, it will become yours," will take effect according to some, in case the donor predeceases the donee, as an *umra* in favour of the latter; according to others, as an absolute gift,[2] (provided there is no other limitation).

According to Makki, the Shaikh and others, a succession of life-estates is valid and lawful.[3]

Where a grant is to *A*, and *his children*, "generation after generation," or where a grant is made to *A*, with the addition of the usual expression which implies a perpetual descent in the grantee's line, *e.g.*, *naslan baad nasl batnan baad batn*, the grant conveys to the grantee an absolute estate, the terms used implying perpetuity of the grant. In fact, a grant to the donee and his descendants gives to the donee an estate-in-fee subject to no restraint of any kind upon alienation or otherwise.

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[1] *Wa-mundigân* includes such persons as the deceased leaves him surviving in his family, whether an heir or not, *e.g.*, a son and the son of a pre-deceased son, widows, daughters, children's childen, &c

[2] *Jawâhir-ul-Kalâm*, Chap. on Gift.

[3] See *post*, p. 140.

Nasir Husain v. *Sughra Begum*

In the case of *Nasir Husain* v. *Sughra Begum*[1] it appeared that the plaintiff's father Zulfikar Husain executed on the 23rd of November 1868 a deed of gift, in respect of a certain house belonging to him, to his cousins Ali Muhammud Muzaffar Husain and the defendant Abdul Muzaffar and by another deed of gift duly registered and executed on the 14th of December 1872 he assigned his proprietary right in the same house to the plaintiff Nasir Husain. The right of Ali Muhammud, one of the above-named transferees under the deed, dated the 23rd of November 1868, was attached in execution of a decree against him held by the defendant Sughra Begum. The plaintiff objected in the execution department, but as his objections were disallowed, he brought a suit to establish his right to the house in dispute and for a declaration that on the that on the death of Ali Muhammad all his right in the property ceased and terminated. The main point for determination in the case, therefore, was whether under the terms of the instrument of transfer, dated the 23rd of November 1868, the proprietary right in the house had passed to the transferees. The material portion of that instrument was as follows :—

"I have of my own accord and freewill given the house to my brothers Ali Muhammad Muzaffar Husain and Abdul Muzaffar for their residence and that of their heirs, generation after generation. I, or my heirs neither have nor shall have any claim regarding the house in question, but if the said brothers or their heirs attempt to sell or mortgage the house, I or my heirs shall have a claim to the house; so long as a sale or mortgage is not effected I or my heirs shall have no connection or concern with the house."

The Court of First Instance held that the right of Ali Muhammad, one of the donees, was heritable and transferable, and dismissed the suit. The plaintiff appealed to the High Court, contending *inter alia* that the parties to the suit being Shiahs were not governed by the texts of Mahommedan Law relied upon by the Lower Court which were applicable to Sunnis.

The High Court of Allahabad in affirming the judgment of the First Court made the following remarks :—

"We are of opinion that the Subordinate Judge has come to a right conclusion in this case, and that the house, the subject of the suit, was taken by the defendants not merely for the purpose of

[1] I. L. R., 5 All., p. 505.

residence but absolutely. The operative words in the deed of gift are very clear and strong." (After stating these words the learned Judges continued as follows) :—"Now the meaning of such a conveyance is perfectly clear. The purpose and inducement of the gift of the house is residence, but the gift itself in property is to the donees and 'their heirs, generation after generation,' and what follows is merely in the nature of recommendation, and has not in law the effect of limiting the estate in the house itself. This is the construction of such an instrument under all systems of law, European or Indian. It is clearly conformable to the law of England, and the Subordinate Judge shows that it is in accordance with Mahommedan Law."

"It was argued at the hearing on behalf of the appellant that the parties in the present case are Shiahs, and that the text of the Mahommedan Law and of the other authorities referred to related to the more numerous Moslem sect, the Sunnis. The parties in the present case are undoubtedly Shiahs, and if their Imameea Law had contained any precept or provision inconsistent with the Sunni Law referred to by the Subordinate Judge, it would have been our duty to have given effect to such a state of things. But the careful examination which we have given to the doctrines of the Imameea Code as expounded by Mr. Baillie, 1869, page 226 *et seq.*, has convinced us that there is no difference on this subject between the two systems of Mahommedan Law. In fact, while the Sunni Law is very distinct, the Shiah or Imameea Law is silent on the subject; the intention in the latter system evidently being the adoption and application of the Sunni rule to Shiahs,[1] where their own Imameea Law does not speak, the only cases of gifts of this nature alluded to in the latter being gifts plainly limited to a life-interest."

"There is a passage in Baillie's Imameea Law, pp. 226—227 which if expressing undoubted Shiah doctrine perhaps deserves some notice. The passage is this :—If one should say, 'I have given this mansion to thee for life and to thy successor,' it would only be an *umra* or for his own life, and there would be no transfer to the life-holder according to the most approved opinion,

[1] There can be no doubt that this view is founded on a misapprehension of the Shiah Law.

just as if he had not said 'to thy successor.' If such is the Imameea Law, it is difficult to understand and still more difficult to appreciate a limitation of interest which necessitates the striking out from the words of gift its distinctly expressed extension to a 'successor.' The author does not explain what he is pleased to call 'the most approved opinion.' It is at least a most arbitrary construction of the gift confessing as it appears to do that it could not stand if the terms 'to thy successor' also remained part of the gift. In the present case, however, the estate given by the gift is conveyed in much larger terms giving the house to the donees 'for their residence and that of their heirs, generation after generation, I or my heirs neither have nor shall have any claim regarding the house in question,' words which if they are capable of any legal meaning clearly and distinctly bestow the right to the thing given absolutely."

Section IV.

Gifts with Conditions.

Hanafi Law. If a person make a gift of a certain piece of land to another on condition that the donee should give to the donor the produce of such land for his support,—according to Abu'l Kûsim if the land

Shiah Law. is capable of bearing produce, the gift is good and the condition void. But if the land is waste or unculturable, the gift is bad (*fâsid*). Under the Shiah Law both *the gift and the condition* would be valid. Under the decision of the Privy Council in the case of *Nawab Amjad Ally Khan* v. *Mohamdi Begum*,[1] a gift of the *corpus* with the reservation of a life-interest in the proceeds of the property was held valid. Their Lordships referring to the question under review said :—"It remains to be considered whether a real transfer of property by a donor in his lifetime under the Mahommedan Law, reserving not the dominion over the *corpus* of the property, nor any share of dominion over the *corpus*, but simply stipulating for and obtaining a right to the recurring produce during his lifetime is an incomplete gift by the Mahommedan Law. The text of the *Hedâya* seems to include the very proposition and to negative it. The thing to be returned is not identical but

[1] 11 Moo. Ind. App., p. 517.

something different, see *Hedâya* 'Gifts,' Vol. III, Book XXX, p. 294, where the objection being raised that a participation in the thing given invalidates a gift, the answer is, 'The donor is subjected to a participation in a thing which is not the subject of his grant, namely, the use (of the whole indivisible article) for his gift related to the substance of the article, not to the use of it.' Again, if the agreement for the reservation of the interest to the father for his life be treated as a repugnant condition, repugnant to the whole enjoyment by the donee, here the Mahommedan Law defeats not the grant but the condition; *Hedâya*, 'Gifts,' Vol. III, Book XXX, p. 307. But as this arrangement between the father and the son is founded on a valid consideration, the son's undertaking is valid and could be enforced against him in the Courts of India as an agreement raising a trust and constituting a valid obligation to make a return of the proceeds during the time stipulated. The contention of the parties therefore is not found to violate any provision of the *Hedâya*, and the transfer is complete."

This decision may, at first sight, seem to be in conflict with the doctrine of the Hanafî lawyer Abu'l Kasim, but it must be borne in mind that in the Hanafî Law much of the voidableness of conditions arises from the character of the Arabic expressions. As a general rule, it may be stated that, when the intention to make an absolute gift is clear, any condition which derogates from the *immediate* completeness of the gift is regarded as void. Where the condition may be given effect to without in any way interfering with or detracting from the immediate completeness of the gift, the condition as well as the gift would be valid. If a man were to give absolutely his property to another and place the donee in possession thereof, so far as *its* nature admits, to use the language of the *Majmaa-ul-Anhar*, with the condition that the whole or a portion of the income should be given to him, the donor, or to anybody else during his lifetime, such a reservation or condition would not prevent the property vesting immediately in the donee. The condition, therefore, would be valid. So, also, if a person were to make a gift subject to the donee paying the donor's debts, and place the donee in possession of the subject-matter of the gift, the condition is valid. In this view, the decision of their Lordships in the Privy Council seems to be in accordance with the Hanafî Law.

The gift of a thing which has been lost "when recovered" is bad.[1] For example, if a man were to say to another, "I give thee the pearl which I have lost, recover it and take it." According to Abû Yusuf, this is a void gift, being the gift of a mere speculation. Zuffer, however, holds it to be valid.[2]

But the gift of an enforcible right is valid by *consensus*. For example, *A* may be entitled to a property which is in the possession of *B*. A gift by *A* to *C* of the property or rather the right to the property is valid.[3]

If the gift is made with an option to the donee to accept it or not, the option must be exercised at the place where the offer is made.

If the donor make a gift reserving an option to himself to recall it at his pleasure, the gift is good and the option void.

According to Abû Hanîfa, if a man make a *sadkah* (a pious donation) of a house to his minor son and continue to reside in it without paying any hire, the donation is valid. So it is valid if it is inhabited by another person though without hire, the father being (presumed to be) in possession thereof for the son.

A gift not void for an invalid condition

A gift does not become void on account of an invalid condition. Accordingly, when an arrangement has been entered into between a husband and wife in regard to their respective rights, the consideration for such arrangement takes effect as a gift and does not become void for any invalid condition. "But sale, mortgage and lease," adds Kâzi Khân, "would be void for invalid conditions."

Where a man purchases a house and after obtaining possession thereof makes a gift of it, and if subsequent to the gift another person obtains possession of a moiety on the ground of pre-emption, the gift as to the remainder is invalidated so far as the donee is concerned. In other words, he may return the remaining portion of the gift or keep it.[4]

An acknowledgment of *hiba*

An acknowledgment of *hiba* implies an acknowledgment that all the necessary formalities were complied with. If a man were to say, "I have made a gift of a certain property to Zaid," *such acknowledgment will be effectual also as to possession*; in other words, that he had delivered possession according to law. In this view

[1] *Fatâwa-i-Kâzi Khân*, Vol. IV, 235. [2] *Ibid*, p. 236. [3] *Ibid*, p. 236.

where a gift is made in writing, an acknowledgment made at the time the deed is registered under the Indian Registration Act would imply that possession had been duly parted with. If this view be correct, then the ruling in *Mogul Shah* v. *Mohammed Saheb*[1] can hardly be said to be in conformity with the Mahommedan Law.

If a man direct his partner to give his share of the partnership assets to his adult son, and at the same time authorize the son to receive the same, it would take effect as a complete gift.

[1] I. L., 11 Bom, p. 517.

CHAPTER III.

THE REVOCATION OF GIFTS.

REGARDING the power of the donor to revoke a simple *hiba* or a gratuitous gift, there is considerable divergence between the schools.

Revocation, Shâfei and Mâliki Law.

According to the Shâfeïs and Mâlikis, no gift (excepting such as have been made by parents to their children) can be revoked, whether change of possession has taken place or not. This, of course, is independent of the ground of coercion or want of comprehension.

The parents, however, may revoke gifts made by themselves to their children. But this right of revocation possessed by the father and mother is not absolute. When the gift is in the nature of a *sadkah*, (a grant or donation made with the object of securing happiness in a future life, or for deserving the reward of God,) the gift is irrevocable.

The father and mother are also precluded from revoking their donations to their children under the following circumstances :—

(1) When the subject-matter of the gift does not retain its original form, or has disappeared *in toto* or in part, or has been sold or exchanged ; mere increase or decrease in the value from a fluctuation of the market does not come within this head.

(2) When the donee has contracted a marriage and that marriage has taken place in consideration of the thing given.

(3) When the donee has died and the property has passed to his heirs.

Shiah Law.

According to the Shiah Law, "after possession has been taken of a gift, it cannot be lawfully retracted when made in favour of parents (according to general consensus), nor even when the donee is any other relative, by consanguinity, of the donor, though on this point there is some difference of opinion ,which, however, is not

approved." Nor can a gift made to the wife by the husband or to the husband by the wife be revoked according to the Shaikh and an influential body of lawyers, if transmutation of possession has taken place. They hold that husband and wife stand on the same footing in respect of their mutual gifts as kindred by consanguinity. Those Shiah lawyers are in accord with the Hanafis, who, as will be seen afterwards, hold that the marriage-relation prevents the revocation of gifts. The Mohakkik, however, though he declares it to be abominable for a wife to revoke a gift made to her husband, and for a husband to revoke a gift made to his wife, does not apparently consider it absolutely illegal. Considering, however, how much the moral is mixed up in the *Sharâya* with the legal, I am inclined to think he means the same thing as the Shaikh. A gift to a stranger may be revoked at any time so long as the substance of the thing given is in existence. After it has perished or changed ownership there can be no revocation. In like manner, a gift cannot be revoked if anything has been received in exchange, though the exchange should be of little value. Mere use by the donee of the thing given is not sufficient to preclude the donor from revoking, unless in the use by the donee the subject of the gift has changed its character substantially. A question, however, arises whether when transmutation of possession has taken place, the donor can revoke the gift without the consent of the donee.

Gift to a stranger may be revoked.

According to the Hanafi Law, though the revocation of a gift is worthy of reprobation from a moral point of view, yet it is not illegal. The revocation of a gift, says the *Fatâwa-i-Alamgiri*, "is abominable under any circumstance, but is valid nevertheless." The consequence of this principle is that in every instance a gift may be revoked before delivery of possession, but, after transmutation of possession has been effected, certain kinds of gifts cannot be revoked, whilst the others may be revoked under the decree of the Judge or with the consent of the donee.

Hanafi Law.

When a gift is made to a blood-relation within the prohibited degrees *and delivery of possession has taken place*, the donor has no right of revocation.[1] In order to make a gift irrevocable, it will be seen that not only must it be to a blood-relation but such relation must be within the prohibited degrees. A gift to a cousin is not

[1] 11 Weekly Rep., p. 320.

irrevocable, inasmuch as a cousin is not within the prohibited degrees. Similarly, a gift to the mother of one's wife is revocable as she, though within the prohibited degrees, is not a relation.

It has already been stated that, excepting in the case of gifts to such relations as are within the prohibited degrees, every other gift is revocable. Previous to delivery, the donor can revoke the gift of his own motion either in whole or in part. After delivery, he must obtain either the consent of the donee or the decree of the Judge to validate the revocation. *E.G.*, where a gift has been completed by delivery of the property to the donee, and the donor seeks to revoke it on the ground that it was obtained by fraud or mispresentation or undue influence, such revocation can only be effectuated by the decree of the Court, unless the donee consents to return it to the donor without recourse to the Judge.

All the jurists are agreed in holding that a revocation under a Judge's decree is a cancellation of the original gift, but there is some difference of opinion whether revocation by mutual consent is tantamount to cancellation. The tendency of precedents, however, is in favour of its being a cancellation also. Thus, when one person has given a thing to another who gives it to a third party and then revokes the gift, the power of revocation becomes re-vested in the first donor; but this would not be the case if the second donee was to return the thing to *his* donor by way of a gift; "for the second revocation being a cancellation, it follows that the thing given returns to the former state of property, and that the donor becomes again the proprietor without any necessity for taking possession anew." After revocation the subject of the gift constitutes an *amânut* or trust in the hands of the donee, so that if it should perish he is not responsible for the loss. But when the revocation is neither by a Judge's decree nor by mutual consent, and the donee gives back the subject of the gift to the donor who accepts it, he does not again become the proprietor of it till he has taken possession. When the donor does obtain possession, the gift by the donee takes effect as a revocation by the Judge's decree or by mutual consent, and the donee has no power to revoke it.

Abû Yusuf is reported to have held that, until an order has been passed by a Judge for cancelling a gift, the donee may use and dispose of the subject of it, but any such use or disposal after the

Judge has made his order is unlawful; and the opinions of Abú Hanífa and Mohammed were to the same effect. If the subject of the gift should perish in the hands of the donee, after the passing of the Kâzi's order and previous to the donor's retaking possession, the donee is not responsible for the loss, unless possession had been demanded of him and he had refused to give it. If, after a gift has been revoked, but before any decree of a Judge, the donee should give the subject-matter of the gift to the donor who takes possession, it would take effect as a revocation by order of the Judge.

Suppose the donor expressly foregoes the power of revocation, it still remains intact and does not "drop." But if the right of revocation is compounded by the donor for something given to him by the donee, the composition is valid and the thing becomes an exchange which extinguishes the right of revocation.

Revocation must be in express words.

The revocation must be effected in appropriate terms, such as, "I have revoked the gift," or "restored it to my own property," or "I have cancelled or dissolved it."

If without using any such expression, the donor contracts to sell the subject-matter of the gift or to give it in pledge, such act would not amount to a revocation. And if the revocation is conditional it is ineffective. For example, if he should say, "I will revoke," or "this gift will stand revoked when such an event happens," or "on such a date," it would not be valid, because revocation can neither be suspended on a condition nor referred to a future time.[1]

A gift is not revocable under the following circumstances:—

Circumstances under which a gift is not revocable.

(1) When the subject-matter of the gift has passed out of the possession of the donee by gift, sale, or any other form of alienation by which the right of property is transferred;

(2) When the donee is dead and the subject-matter of the gift has devolved on his or her heirs;

(3) When the donor is dead, in other words, his heirs have not the power of revocation, the option of revocation being a personal right in the donor;

(4) When the thing given is lost;

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[1] *Fatáwa-i-Alamgiri*, IV, p. 537.

(5) When the gift is for a consideration ;

(6) When the subject-matter of the gift has altered in substance in the possession of the donee ;

(7) When an increase or accretion has taken place in the thing given, and such increment or accretion is of such a nature as to be united with or inseparable from it. And it makes no difference in the irrevocability of the gift whether the increase be in consequence of an act of the donee or without such act, and whether it have issued from the thing itself (such as fruits on trees) or be an accession to it (such as accretion by growth). But it must be incorporated with or form part of the body of the subject-matter of the gift and imply an addition to or enhancement in its value. Dyeing, sewing, porterage, &c., are considered as causes which extinguish the power of revocation ;

Mere transfer from one place to another, when it adds to the value and has occasioned expense, is sufficient to prevent revocation. A separate increase does not prevent the revocation of a gift nor any loss or damage sustained by the subject of the gift ;

Hanafi Law. Marital relationship bars revocation.

(8) When the donor and donee stand to each other in the marital relationship. But such a gift in order to be irrevocable must be made during the subsistence of the relationship. For example, a gift made prior to marriage may be revoked. But when a gift is made during marriage and the relationship is afterwards dissolved, the gift cannot be revoked. Difference in the creed of the married parties makes no difference in the irrevocable character of the gift.

(9) Relationship of blood within the prohibited degrees is a bar to revocation, without any restriction as to the creed of the donor or the donee.[1]

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[1] *E.g.*, Parents and grandparents how high soever and children and their descendants how low soever ; sisters and brothers and their descendants, paternal and maternal uncles and aunts ; *Radd-ul-Muhtâr*.

"If a person make a gift of anything to his relation within the prohibited degrees, it is not lawful for him to resume it" ; *Hedâya*.

Where an alien who has obtained the protection of a Moslem State, while living in the country of Islâm, makes a gift to his Moslem brother, and then goes away leaving permission to the donee to take possession which is done, it is valid in law ; but if the gift was made by the Moslem to the alien brother, and he went to the *Dâr-ul-Harb* before acceptance, the gift would become

(10) The natural growth of the subject-matter of the gift also debars the donor from revoking.

Where the power of revocation exists, it may be exercised either with reference to the whole or a part.

When a gift is revoked, the donor can exercise his proprietary rights from the time the subject of the gift comes into his possession; but he can give no antecedent effect to them. Thus, when a man has made a gift of a house and delivered it to the donee, and a house adjacent to it is sold, after which he revokes the gift, he has no right of pre-emption in regard to the second house.

No revocation in the case of a discharge of a debt.

When a debtor has been discharged from his liability, the creditor or donor has no power of revocation in regard to the debt so discharged.

According to the *Khazânat-ul-Muftiin* relationship arising from fosterage or affinity does not bar revocation.

Where one person makes to another the gift of a horse, and the donee has it trained, there is no power of revocation on the part of the donor. Approximate accompaniments acquired after the gift debar the right of revocation.[1]

The removal of the subject-matter of the gift from one place to another at expense or with labour bars revocation. If a man make a gift of clothes to another who has them washed by a washerman, the right is barred.

If a person make a gift of some dirhems to another, and then borrow them from the donee, the right of revocation is lost, the character of the subject being changed.

As after delivery of possession revocation does not take effect without the decree of the Judge or the donee's consent, if a person were to make a gift and deliver possession thereof to the donee, and after that were to take it back without the donee's consent or the order of a Judge, and the thing be lost, the donor is liable for damages.

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void; *Mabsût*. Where a gift is made to the mandatory of a brother, it cannot be revoked. And if the gift is rejected by the mandatory and accepted by the principal, it is valid; *Kinia*.

See s. 126 of the Transfer of Property Act. But under s. 129, nothing in Chapter VII (chapter relating to Gifts) "shall be deemed to affect any rule of Mohammedan Law."

[1] Kâzi Khân.

If a woman make a gift to her husband and then allege that it was extorted from her by force or threats, her claim should be received.[1]

Summary of rules as to revocation.

When a gift is made simultaneously or jointly to a relative within the prohibited degrees and to a person not so related, the gift to the latter may be revoked.

Sadkah not revocable.

(*a*) *Sadkah* or gift by way of a pious offering completed by possession cannot be revoked.

For a pious gift is to obtain merit in the sight of God and that has been obtained by the gift. If a person bestow something on a rich person by way of a pious gift, it is not lawful to revoke the gift; because to acquire merit in the sight of God may sometimes be the object in bestowing alms upon the rich. "In the same manner also if a person make a gift of anything to a poor man without using the term *sadkah*, it would not be lawful on his part to revoke the gift."

Its *raison d'être.*

Any gift made with a view to recompense in future life is *sadkah* and irrevocable. A *sadkah* may be made in favour of any individual, rich or poor, a relation or stranger. The difference between *hiba* and *sadkah* consists in the object with which the donation is made, *viz.*, in the case of *hiba*, the desire is to increase the mutual affection of the parties or to evidence esteem,[2] in the case of *sadkah* the object is, as the *Hedâya* puts it, "to acquire merit in the sight of the Lord." Vows for almsgivings, when actually carried out, take effect as *sadkah* and are governed by the same rules. "*Sadkah* requires seisin of the subject of the gift. Like gift it is not valid unless attended by seisin, as it is gratuitous in the same manner as a gift. Neither is a *sadkah* lawful where it consists of an undivided part of a thing capable of division. Retractation of a *sadkah* is not lawful; because the object in making a *sadkah* is merit in the sight of God, and that has been obtained. If also a person make a pious offering to a rich man, it is not lawful to retract therefrom on a favourable construction of the law, because to acquire merit in the sight of God may sometimes be the object in making a pious donation to the rich. In the same manner also, if a person make a

[1] Probably when supported by *primâ facie* evidence—See *Buzlur Rakim* v. *Shamsunnissa*, 11 Moo. Ind. App, p. 310.

[2] *Mishkât*; Kâzi Khân; *Sharâya-ul-Islâm.*

gift of anything to a poor man, it is not lawful to retract it, because the object in such gift is merit and that has been obtained."

(*b*) Before delivery of possession a gift may be revoked without the order of the Kâzi or the consent of the donee.

(*c*) If possession has been given to the donee, he is entitled to retain the gift and use its profits until the Kâzi has made his order.

(*d*) If a person were to make a gift of a house to another, and the donee subsequently has it painted or plants trees in or about it or in any way alters it, the gift is irrevocable.

(*e*) When a portion of the gift is destroyed, the remaining portion may be revoked.

(*f*) When a gift is made to two *ghair-mahram*,[1] the portion of any one of them may be revoked, the gift as to the other remaining good.

(*g*) If a gift is made by two persons to one donee, any one of them may exercise the right of revocation in respect of his share without the consent of the other.

(*h*) Express withdrawal of the power of revocation does not destroy it.

(*i*) There is no power of revocation in the case of a gift of a debt to a debtor. The debt becomes satisfied or cancelled by the gift, and therefore does not exist to be revoked.

(*j*) If a person make a gift to another of a piece of land, which is unoccupied at the time and destitute of buildings and plantations, and the donee plant trees or erect buildings on it, the donor in that case is not entitled to revoke his gift. A small temporary erection, such as a shed, does not operate as a bar to revocation. Any actual and substantial improvement is sufficient to prevent the donor from exercising the right.

(*k*) The acceptance by the donor of a consideration or *ewaz*, *however small*, is a bar to revocation; and though the *ewaz* for the gift may have been made by a third person voluntarily on behalf of the donee, its acceptance by the donor would deprive him of his right of revocation.

(*l*) If the donee has given anything in exchange for the gift and a portion of the gift proves to be the property of some other

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[1] A relation not within the prohibited degrees.

person who recovers it from the donee, in that case the donee is entitled to receive from the donor a proportionate share of the exchange given by him. If, on the contrary, any portion of the consideration form the property of another person, the donor in such a case would not be entitled to resume a proportionate share of the gift, but he may return to the donee the remainder of the consideration or exchange in his hands and then resume his gift.

(*m*) When a person revokes his gift either by virtue of a decree of the Kâzi or by the consent of the donee, it is in effect a cancellation of the original gift and not a gift *de novo* on the part of the donee and therefore seisin by the donor is not, in such a case, a requisite condition.

(*n*) Revocation is lawful with respect to an undivided portion. If a revocation amounted to a gift *de novo* from the donee to the donor, seisin, say the Hanafî lawyers, would be a requisite condition, and consequently revocation with respect to an undivided portion would not be lawful.

The principles dealing with the powers of a donor to revoke a gift are of importance in considering the question how far a transfer subsequent to a valid donation is effective or otherwise. For example, if a person were to make a gift to his child and then purport to sell it to another, such sale, though for a *bonâ fide* consideration, would not be valid. Similarly, if the gift were to a relative not within the prohibited degrees, who was put in possession of the property and who subsequent to the gift made some alteration or improvement in the same, a sale thereof by the donor would not be valid, for in both these cases the right of the donor had become extinguished and it was no more his to convey to another. The Transfer of Property Act leaves untouched the provisions of the Mahommedan Law on this point ; (See *s.* 2, *cl. d.*)

CHAPTER IV.

CONSIDERATION OR EWAZ.

Section 1.

Ewaz or consideration for a gift.

The consideration for a gift may either be stipulated for in the contract of the gift, that is, the consideration may be paid or given at the time of the gift, or be subsequent to the donation. With regard to a consideration given after the original gift has been made, it must be distinctly specified that the consideration is in lieu of the gift, and in the second place, the consideration should not form a portion of the subject-matter of the gift. If the consideration be a portion of the gift, it would not be valid and there would be no *ewaz*. But if such a change has taken place in the thing given, as would prevent revocation of the gift, part of it may be constituted a consideration or *ewaz* for the remainder. If two things are given by two different contracts, one of them may be given in exchange for the other. It is also a condition that the consideration must be secured to the grantor. If the grantor has to make over the consideration to anybody else, then there is no exchange and the gift, may be revoked. But if a portion of the *ewaz* becomes lost the remainder is a good consideration for the entire gift.[1]

When the exchange takes place subsequently to the gift, the *ewaz* is regarded as a gift *ab initio*. But though the subject of the exchange is regarded as a gift, the giver (the original donee) has no power to revoke it after giving it. And after possession has been taken of the *ewaz* by the donor of the original gift, the donee's power to revoke the gift ceases absolutely. So that whether the *ewaz* were given by the donee or by a stranger, with or without his direction, neither the donor nor the donee can reclaim from the other what he has become possessed of. "All the conditions of gift

[1] Kâzi Khân.

are applicable to the *ewaz*; and the transaction does not come within the meaning of a contract of *mudâwizat*, or mutual exchange, either in its inception or completion. Hence, it is not subject to *shufâ*, or the right of pre-emption; nor can the thing given be rejected on either side on account of defect; so in the *Muhît-i-Sarakhsi*."

Hiba-bu shartul ewaz or gift with a condition of exchange.

"When a gift is made on the condition that something should be given in lieu thereof, it is necessary that it should not be property which is subject to the rule of *mushâa*, or anything that admits of partition, for an *ewaz* or consideration under such circumstances is subject to the same rules as the primary gift itself, that is, is regarded as a gift in itself. Property is not established in the subject before possession, and each of the parties may refuse delivery. But after mutual possession has been taken, the effect is that of sale; and the donor cannot revoke his gift nor the donee the *ewaz*. *Shufâ*, or the right of pre-emption, is established by the transaction; and each of the parties may return the thing of which he took possession for any defect." "According to *kyâs*, (or analogy,)" says the *Fatâwa-i-Kâzi Khân*, however, "a gift on condition of an exchange ought to be a sale in its inception as well as in its completion." "When a man gives a mansion to two men on condition that they should pay an *ewaz*, or exchange of a thousand dirhems, the *transaction amounts to a lawful sale after mutual possession*, says the *Kinia*."

Hiba bil ewaz not revocable

Where a person gives an *ewaz* for the whole of a gift, it bars revocation, *whatever the amount of the consideration may be*; if the *ewaz* be for a part of the gift, the part for which there is no *ewaz* may be revoked, but not that part for which the *ewaz* was given.[1] It is not necessary that the donee himself should give the consideration, for an *ewaz* given by a stranger is lawful, whether by the direction of the donee or not. Where a person other than the donee gives the *ewaz*, he cannot recover it from the donee unless he (the donee) made himself specifically liable for it

"The general principle in cases of this kind is," says the *Fatâwa-i-Kâzi Khân*, "that when anything is demandable of a person in specie, and is obligatory upon him, his direction to another to pay it is a cause of recourse against himself without any condition of

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Sharh-i-Tahtâwi.

responsibility, and that when a thing is not demandable from a person in specie and is not obligatory on him, his direction to another to pay it is not a cause of recourse against him, unless his responsibility is made a condition of the payment."

If the father of an infant were to grant to another by way of a gift some property belonging to his child and receive from that person something in exchange, he may revoke the gift, or the donee may revoke his consideration, at any time they like. And when a person has given something to a minor, and his father makes an *ewaz* for it out of the minor's property, the exchange is not lawful though the gift were made on condition of an *ewaz*. The reason of both the above principles is apparent; the father having no right to deal with the property of the minor, except for certain purposes. Where a man suffering from an illness to which he eventually succumbs makes to another a gift of property of the value of a thousand dirhems, having no other property besides, and the donee gives an *ewaz* for the gift, of which the donor takes possession and then dies, the *ewaz* being in his possession at the time of his death, if the *ewaz* be equal in value to two-thirds or more of the property given, the gift is valid, but if the *ewaz* be less than two-thirds of the value thereof, the heirs would be entitled to recover from the donee the difference between the value of the two-thirds of the subject-matter of the gift and the actual value of the exchange. For example, if the *ewaz* was only worth 500 dirhems, the heirs of the donor will be entitled from the donee to one-sixth of 1,000 dirhems, "though the *ewaz* were stipulated for in the original gift." The donee, however, may, if he please, return the whole gift taking back his *ewaz*, or restore a sixth of the gift and keep the remainder.

The following examples taken from the *Fatâwa-i-Kâzi Khân* will not be without value on this subject.

"Anything given in exchange for a gift bars revocation. Nor can the gift of an *ewaz* be revoked; it must be clear, however, that the consideration was given in exchange for the gift.

"Any person other than the donee, whether with or without the consent of the donee, may give an *ewaz* for a gift, thus destroying the right of the donor to revoke the gift, that is, if he has accepted the consideration.

"If the consideration is given by a person other than the donee, he may revoke the same unless the donee has made a

bargain with such person that the consideration will be paid back to him.

"Even should there be any defect found by the donor in the thing given by way of an exchange he cannot revoke his gift.

"When a gift is made to two people and one of them gives an *ewaz* for the share given to him, the donor may revoke as to the other share.

"If a gift is made to a minor, and the father or his executors give an *ewaz* out of the property of the minor, such grant is not valid, and consequently the donor can revoke."

"If a person set up a claim to an *ewaz* and recover the same, the donor can revoke, but if he recover only a portion and there remain yet a portion thereof in the hands of the donor, he cannot revoke, for the smallest consideration is sufficient to destroy the power of revocation."

"If the subject-matter of the gift is recovered by another person legally entitled to it, the donee may recover the whole of the *ewaz*; if a portion only is recovered by the rightful claimant, the donee can recover only a proportionate share of his *ewaz*."

"If the donee convert a portion of the gift into another substance and give it in exchange it would be a good *ewaz*. If a person make a gift of one thousand dirhems to *A* who gives in exchange out of the same one dirhem this is not a good *ewaz* according to 'us,' though Zuffer differs."

"If a Christian make a gift to a Moslem and the latter give in exchange any prohibited article the exchange is not good."

Where a gift is made by a minor to *A* who gives an exchange, the gift is null and inoperative nor does the *ewaz* vest in the minor.

Hiba-bil-ewaz. A *hiba-bil-ewaz* is a sale in all its legal incidents. In sale, mutual seisin is not requisite to render the contract valid, and the terms in which a contract of this kind is entered into imply, that the articles opposed to each other are present, and that there is no danger of either party suffering from the other's fraud. "I have given you this for that" implies that the consideration is present, and that the person will take care to receive it before parting with his property, and the law therefore annexes to it the quality of a sale both with regard to the condition and the effect.

Seisin not requisite. Suppose, for example, a person in making a gift expressed himself to this effect, that he had made a gift to and conferred upon

another the proprietary right in his entire property in exchange of something given by the donee,—this is not a gift in consideration of an exchange, to be prospectively given, but it is a contract of mutual transfer or sale both as to the condition and the effect. In such a case, seisin is declared not to be a requisite condition.

Hiba-ba-shart-ul-ewaz.

A *hiba-ba-shart-ul-ewaz* is a contract of a different description. The terms used in the constitution of such a *hiba* imply a contingency. Thus :—"I have given you this on condition of your giving me such a thing." Now, it will be observed that in this contract, its legal operation depends upon the fulfilment of the condition, being the delivery and seisin of the *ewaz* or consideration ; otherwise, if it were valid and binding without such condition, the consideration might be withheld, and it might thereby become, as it were, a *nudum pactum*. As to the effect, this contract is declared to have the property of a sale, that is to say, *after mutual delivery of seisin it becomes in effect a sale.*

For example, if a person were to declare that he had made a gift to, and conferred on another the proprietary right to his entire property on condition that the donee should give to him something in exchange for the gift, and the donee were to accept the condition, it would be a gift *ba-shart-ul-ewaz or a gift on condition of an exchange.* So long as the condition is unfulfilled, it is a gift revocable at the will of the donor under the same circumstances as a *simple* gift. And for the same reason delivery of seisin is necessary. But once the condition is fulfilled the contract becomes a sale. It is therefore stated in the *Sharh-i-Chalpi* that a *hiba-ba-shart-ul-ewaz* "technically, as regards the *shart*, is considered in the right of a gift, and sale as to the effect. Seisin is requisite to its validity and the gift cannot be said to be established until the parties shall have delivered seisin to each other, but the property conferred remains as formerly at the disposal of the donor."

The effect of a *Shart* (condition) attached to a gift.

Where a gift is made with a condition attached to it, which condition is not a mere problematical contingency, but capable of being fulfilled by the donee, or of itself in the natural course of things, the condition is valid and so also the gift. Some examples of this are given in the *Sharh-i-Chalpi* :—It says "in the *Bakâli* it is stated from Abû Yusuf that if a man were to tell another, 'this thing is for thee if thou likest,' and make it over to him, and the person addressed reply, 'I like' or 'accept,'—the condition (*shart*) is good.

So also it is reported from Mohammed, if a date tree begins to bear fruit and the owner of the tree says to another, 'these dates are for thee, if they get ripe,' or 'if to-morrow comes,' it is lawful. But if he were to say, 'these dates will be thine, if Zaid enters his house,' it will not be valid."

Gift and release do not admit of the option of stipulation.

When a gift is made subject to a condition that the donee shall have an option for three days within which to accept or reject, the gift is valid if the acceptance be expressed before the separation of the parties; but if not accepted by him till after they have separated, it is not lawful. But when a gift is made on a condition that the donor shall have an option for three days, the gift is valid, and the option void; "because gift is a binding contract, and therefore does not admit of the option of stipulation." "When a person says to another, 'I have released thee from my right against thee, on condition that I have an option,' the release is lawful, and the option void."

Distinction between a conditional gift and a gift with a condition.

"A man to whom a thousand *dirhems* are due by another, says to him, 'When to-morrow comes the thousand is thine;' or 'thou art free from it,' or 'when thou hast paid one-half of the property then thou art free from the remaining half,' or 'the remaining half is thine,' the gift is void. But if he should say, 'I have released you on condition that you emancipate your slave,' or 'Thou art released on condition of thy emancipating him by my releasing thee,' and he should say, 'I have accepted,' or 'have emancipated him,' he would be released from the debt.

Hanafi Law

As regards vitiating conditions attached to gifts primarily intended to take effect absolutely, the principle is stated thus in the *Sirâj-ul-Wahâj*. "All our jurists agree in holding that when a gift is made, and a vitiating condition is attached to it, the gift in that case would be valid and the condition void. For example, if a person were to *give* something to another and stipulate that he should not sell it, the gift would be valid, and the condition void. It is a general rule with regard to contracts, in which seisin is necessary, such as *hiba* and *rahn* (pledge), that a condition *dehors* the absoluteness of the contract, would not void the contract, but drop itself." In other words, where a person intends to give *absolutely* and expresses his intention by the use of words which convey the meaning of an *absolute* gift, he can not impose limitations on the enjoyment or devolution of the subject-matter of the gift.

Gifts dependent upon the happening of a contingency are void.

Examples of contingent gift

If a woman were to say to her sick husband, 'if you die of this sickness, you are released from my dower, or my dower is on you as *sadkah*,'—this is void because it is a contingent gift.[1] Or if a sick woman were to say to her husband, "if I die of this my disease, my dower is to thee as *sadkah*," or "you are released of my dower," and she does die of the disease the gift is void, and the dower remains due by the husband.[2] Similarly, if a person were to say to another who owes him money, "if you do not pay me what you owe me till you die, you are released," this is void according to the *Bahr-ur-Râik*. But if he should say, "when I die, thou art released," it would be lawful, says Kâzi Khân. While if he were to say, "if I die, then thou art free from this," there is no release, for this is contingent. Similarly, if he were to say, "if thou enterest the house, thou art free from what I have against thee."[3]

Illegal considerations for the discharge of a liability are wholly ineffective in making the discharge operative, *e.g.*, if a person were to say to another, "I would release you from my debt if you would settle an important matter for me with the Sultan,—he is not released, for this is a bribe."[4]

Section II.

Gift of a Debt.

The gift of a debt.

"The gift of a debt to a debtor," says the *Alamgiri*, "is valid both according to *kiyâs* and law; and to any person other than the debtor, it is valid according to law, when he is authorized to take possession of it.[5]

"When a gift is made of the debt to the debtor himself it amounts to a discharge and is complete without his acceptance; but should he reject it the gift does not take effect, and the creditor would be bound to accept payment of the debt. The above principle is applicable to a case where the debt is not cash. If it is, then it is

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[1] From the *Alamgiri*, Gift of a debt, Vol. IV, p. 535.

[2] *Zahiria.*

[3] *Khazânut-ul-Muftiïn.*

[4] *Kinia.*

[5] The authority cited is the *Tâtâr-Khânieh*, but there is absolute consensus on this point,

dependent upon the debtor's acceptance. If he accepts it, he is discharged ; but if he does not, he remains liable. This is not the case with other debts, which are discharged whether the debtor [expressly] accepts the release or not ; but with reference to those also, *the gift is open to rejection*."

With reference to the donation of the debt to the surety the matter stands upon a different footing from the discharge of the suretyship. The principle seems to stand thus :—The gift of the debt to the surety is not valid without his acceptance, and would be liable to a reversal on rejection ; but a discharge is valid without acceptance and would not be reversed on rejection.

If a *hiba* is made of a debt to the debtor who dies before rejecting the gift, he would (nevertheless) be discharged. Similarly, if the *hiba* is made or discharge is given after the debtor's death, it is lawful. But his heirs may reject it, and the debt would be paid according to Abû Yusuf. Mohammed, however, differs, and holds that there would be no liability.[1]

If a creditor were to discharge the principal debtor, and he accepts, then both he and the surety are discharged. But neither he nor the surety would be discharged if he should not accept.[2]

If a man dies indebted to another, and the creditor makes a *hiba* of the debt to the debtor's heirs, it is lawful.[3]

When the gift is to some of the heirs, it will enure to the benefit of all the heirs.

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If the creditor dies leaving several heirs and one of them before the partition of the deceased's estate releases the debtor in respect of his share of the debt, the release is valid. The principle is thus stated in the *Kînia*. "One of the heirs of a creditor gives up his share in a debt to the debtor before partition, and in the deceased's estate there are both money and goods, the gift is valid in law, like a composition."

There occurs the following passage in the *Alamgiri* as taken from the *Tâtâr-Khânièh* :—"The gift of a debt to the infant son of the debtor is not valid." The meaning of this doctrine, which

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[1] This is the received doctrine according to all the *Mashâikh*. *Jawâkir-ul-Akhlâti*.

[2] *Zakhîra*.

[3] *Khulâsa*.

in the *Majmaa-ul-Anhar* is considered to be of doubtful authority, probably is that as the validity of the gift of a debt to a third person depends on the express direction to him by the creditor to recover the debt, and as the infant child of the debtor can not be so authorised either personally or by its natural guardian, (being the debtor himself,) the gift can not take effect. But this does not involve the conclusion that where a debtor is dead and the creditor chooses to make a gift of the debt to his child or to discharge him of any liability thereunder, it would be invalid.

When the gift of a debt is validly made to a debtor, he is entitled to recover from the creditor any property hypothecated for the debt.[1]

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A creditor makes a gift of his debt to his debtor, who neither accepts nor rejects it at the meeting, and then comes after the lapse of some days and rejects the gift ; there is some difference of opinion on the point, but the sound doctrine is that the gift is not reversed.

"When a debt is due to two persons, and one of them gives up his share to the debtor, the gift or release is valid."[2]

A release suspended upon the happening of a contingency is invalid. But where it is made dependent upon a condition which is immediately fulfilled, it is valid ; for example, if a man were to say to another, "if thou owest me any debt, I absolve thee from it ;" such a gift would be valid if the debt was existing at the time. So also if he were to say "when I die, thou wilt be discharged from my debt," it will be valid, the discharge taking effect as a bequest.[3]

In the case of a release from a liability, delivery of seisin is not possible, and therefore it is laid down that "the gift of a debt to the debtor and his discharge from the liability takes effect without his acceptance, for the discharge of a debt is equivalent to its cancellation and therefore acceptance and possession on the part of the donee are not necessary."

The gift of a debt to a person other than the debtor is valid under the following circumstances :—[4]

(*a*) When it is made by way of *hawâlat*, that is, the person to whom the assignment is made is constituted an agent for the creditor ;[5]

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[1] *Tâtâr Khânieh.*

[2] Kâzi Khân.

[3] *Ibid.*

[4] *Hed.* III, p. 309.

[5] *Hed.* III, p. 606.

(*b*) When it is bequeathed by way of a legacy ;

(*c*) When the assignee is placed in a position to recover the debt.

A condition for an exchange is valid if the subject of the exchange is specific and not *majhûl* (unknown).[1] Where a person is discharged or released from a liability upon any specified condition, the infraction of the condition revives the liability, *e.g.*, if a woman absolve her husband from her dower-debt upon any condition which is afterwards infringed by him, the liability would re-attach and he would continue liable for such debt. • "If she were to say to her husband, 'I absolve you from my debt *on condition* that you do not marry another woman,' and he accept the discharge and subsequently take a second wife, he will continue liable for the dower of the first wife."

But when the discharge is made dependent upon a wholly uncertain contingency, it is inoperative : *e.g.*, if a man were to say to his debtor "if I do not demand my debt from you until my death, it is yours," this is invalid.

A gift of a debt cannot be retracted if the debtor has once consented to the discharge.

When there are two creditors and one debtor, any one of them may discharge the debtor in respect of his share of the debt, or to use the phraseology of the Mahommedan lawyers, may make a gift of his share of the debt to the debtor.

Section III.

Further Rules as to the Law relating to Gifts.

Gifts by parents and *de facto* guardians to their children and wards.

A father may, in health, give his entire property to any one of his children.[2] It would be sinful, but if the gift is not invalid or void for other reasons, it will be legal.[3]

"A gift by a father of a house in which he lives or has his property is good according to Abû Yusuf and the *Fatwa* is according to him." The *Sharh-i-Vikâya* states the principle more fully : "If a father make a gift of something to his infant son, the infant in virtue of the gift becomes proprietor of the same. The same rule holds when a mother gives something to her infant son, whom she maintains and whose father is dead and no guardian is provided and

[1] *Radd-ul-Muhtâr*, IV., p. 779.

[2] From Kâzi Khân.

[3] *Durr-ul-Mukhtâr*.

so also with respect to the gift of any other person maintaining a child under these circumstances. If a stranger make a gift of a thing to an infant, the gift is rendered complete by the seisin of the father of the infant. If a person make a gift of a thing to an orphan and it be seised on his behalf by his guardian, being either the executor appointed by his father or his grandfather, it is valid. If a fatherless child be under charge of his mother, and she take possession of a gift made to him, it is valid. The same rule holds with respect to a stranger who has the charge of an orphan. If an infant should himself take possession of a thing given to him it is valid provided he be endowed with reason."

If a father makes clothes for his infant son with the express intention that it was for the child, he cannot give the clothes to another.

Gift by a wife of her dower.

A gift of dower[1] obtained by the husband by force or misrepresentation is invalid, *i.e.*, where a husband by force or misrepresentation induces his wife to release him from the dower-debt, such release or discharge is not valid.[2]

In the *Bahr-ur-Râik* it is laid down that a person to whom there are debts outstanding can lawfully make them over by gift to another who is not 'indebted to him,' directing the donee to realize such debts, and take them for his own use—and such gift is valid. And in the *Fatâwa-i Kâzi Khân*, as a consequence of the above principle, it is stated, that "a woman is entitled to convey her dower-debt to her infant child, and the child would be entitled to claim the same from the father on attaining majority. Similarly, a married woman has the power to compound her dower-debt with her husband and accept in lieu thereof anything else." In this country a conveyance betweeen the married parties by which the husband conveys some property to his wife in satisfaction of her dower-debt is called a *bye mukâsa*. A *bye mukâsa* is a sale out and out in lieu of dower.[3]

Bye Mukâsa.

"If a woman compromise her dower for anything which has not been seen by her before delivery, and she subsequently become aware that it is defective, she is entitled to repudiate the contract and her right to the dower remains intact."

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[1] From Kâzi Khân

[2] See *Moonshee Buzlur Rahim* v *Shamsunnissa Begum*, 11 Moo. I. A., p. 551.

[3] See I. L., 8 All., p. 178.

"A woman may release her dower to her deceased husband," that is, the widow is entitled to exonerate or discharge the estate of her deceased husband from the liability for her dower-debt.

"When a woman makes a gift of her dower on certain conditions which are not fulfilled, the gift is null. For example, if the dower-debt is released in consideration of the husband taking her on a *hajj*, or not treating her with cruelty, or not preventing her visiting her relations, and the condition or conditions are not fulfilled, there is no abandonment of the dower."[1]

"When a woman makes a gift of her dower on condition of the husband giving her something in return every year, and the husband fails to fulfil his part of the agreement, the gift fails also, for the gift in this case is a *hiba-ba-shart-ul-ewaz*, that is an executory gift which is not completed and rendered perfect until the condition as to the *ewaz* is performed. And consequently when the *ewaz* is not obtained the gift fails."

"A woman makes a gift of her dower on the condition that her husband divorces her, and the husband accepts the gift subject to the condition, but does not divorce her, he is not absolved from the dower-debt."[2]

"When a sick woman has given her dower to her husband, the gift is valid if she recovers from her illness, and even though she should die of that illness, yet if it were not a death-illness the answer would be the same, but if it were a death-illness the gift would not be valid without the sanction of the heirs."

A gift by way of a *rukba* is invalid according to all the Sunni schools, being a gift dependant on a contingency of a nature both uncertain, and involving as it were a wager on one's life. A *rukba* is constituted by a person declaring "If I die before thee, this house of mine is thine, if thou diest before me it is mine."

But when a *rukba* is made and the grantee is put in possession of the subject of the grant, it would amount to an *ârriat* or commodate loan returnable to the grantee whenever he likes.

If a person is the proprietor of a building as well as of the land upon which it is situated, he may make a gift of the building without the land and it will be valid.[3]

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[1] Kâzi Khân.

[2] *Radd-ul-Muhtâr*, throughout.

[3] *Radd-ul-Muhtâr*, IV, p. 780.

CHAPTER V.

THE SHIAH LAW RELATING TO *HIBA* OR GIFTS.

SECTION I.

THE Shiah doctrines have been sufficiently indicated in the preceding pages. It may, nevertheless, be useful to give a summary of the general principles in a consolidated form.

One of the principal features of difference between the Shiah and the Hanafi school on the subject of gifts consists in the rule relating to *mushâa*.

The Shiahs do not recognise the objection to a gift on the ground of the subject-matter being divisible and confused. The *Mabsût* says, "in our *mazhab*, *i.e.*, according to our doctrines, the gift of a share of a property whether partible or not is absolutely valid."[1]

Limited estates.

In contradistinction to the Hanafis, the Shiahs recognise the lawfulness of limited estates.

A grant to *A* limited to his life is valid, the subject-matter of the gift reverting to the donor or his heirs upon *A's* decease. So also a grant to *A* for life, and after him to another for his life will take effect as giving a life-estate to *A*, and after him a life-estate to the other person, after which the property would revert to the donor or his heirs. Similarly, a grant may be made to *A* for life and then to *B* absolutely, or a grant may be made to *A* for life and then to *A's* children absolutely. There is some difference of opinion as to whether only the children living at the time of the grant will take the remainder absolutely, or any children born to *A* after the grant will take also. The approved opinion seems to be that *all* the children will take, whether living at the time of the grant or born afterwards. But where a grant is to *A*

[1] *Mabsût.*

for his life and to his children for *their* lives, only the children living at the time of the grant will take with rights of survivorship.[1]

A grant to *A* for his life and then to *B* for his life, and thereafter to *A's* children absolutely is equally valid.

According to the author of the *Sharâya* a grant to *A* and his عقب *akab* ("one who comes after him") would give only a life-estate to *A*, as the term *akab* does not indicate a person and conveys no definite meaning. According to the *Sarâir* and other works, such a grant would give an absolute estate to *A*.

But when a gift is made to *A* for his life and after his death to his *heirs*, or if it is made in these terms, "the usufruct should be given to *A* during his lifetime and after him to his heirs,"[2] the grant would convey merely a life-interest to *A* and the absolute estate to *A's* heirs. In the case of *Prince Suleman Kadir* v. *Darab Ali Khan*[3] their Lordships of the Privy Council gave expression to a *dictum* which might, perhaps, be supposed to imply a non-recognition of limited estates, but the view suggested was evidently founded not on the Shiah Law but entirely on Sunni authorities.

A gift to *A* and his children generally, *aulâd* or *farzandân*, or to his children *naslan baad nasl batnan baad batn*, "generation after generation, line after line" will convey to *A* an estate in fee, the words "children after children, generation after generation" being words of description and not of limitation.

When a grant is made with the word *hiba* it implies, generally speaking, the grant of an absolute estate, for *hiba* is defined to be an act, by which one person transfers to another, gratuitously, without the motive of *kurbat*, i.e., of pleasing God, accompanied by immediate transfer, constructive or actual, the entire and absolute property (*milk*) in a certain thing. Such a transfer in the Arabic language is also constituted by the words *an-nahila* (a present) and *al-atîa*. In Hindustani, the word *atîa* is equivocal, and so are the words *dêna* and *bukhshnâ*. When grants are made with these words, the intention of the grantor must be examined from the context of the deed of gift and surrounding circumstances, *viz.*, whether he intended an absolute gift or to convey only a limited estate.

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[1] *Jawâhir-ul-Kalâm*; none of these principles is affected by any dicta in *Tagore* v. *Tagore* (9 Beng. L. R., p. 377), or *Peake* v. *Robinson*.

[2] *Jawâhir-ul-Kalâm*.

[3] L. R., 8 I. A., 117, see p. 122.

Powers of the life-tenant.

The life-tenant or the holder of an estate for a term has the right of letting the property for any period not exceeding his own interest, provided there are no limitations on his power or his mode of enjoyment. He is bound, however, to return the property on the expiration of the period of his interest in proper order, natural deterioration and the lawful enjoyment of the same excepted.

Under the Shiah Law the donor may reserve a life-interest in the usufruct of the property, so long as that reservation does not interfere with the vesting of the property in the donee. For example, *A* may grant a tenanted house to *B*, conditioning that during his lifetime he should receive the rent thereof. The principle enunciated in *Nawab Amjad Ali Khan* v. *Mohomdi Begum*[1] is in accordance with this rule.

As already explained, *rukba* is a generic name for all limited estates under the Shiah Law. It includes both an *umra* and a *sukna*. When the usufruct of a property is given to another for a limited period it is generally called an *umra*. When a house is given for residential purposes, it is called a *sukna*. Under the Hanafi Law both these will come under the head of an *aâriat*, but whereas an *aâriat* is resumable at the will of the donor or his heirs, an *umra* or *sukna* is operative for the fixed term and cannot be resumed.

A person is entitled under the Shiah Law to create other limited rights over his property. For example, a person may give to another a right-of-way over his land for a term, without giving rise to a perpetual easement, or may authorise him to take water from his cistern, &c. Such limited rights are also called *rukbas* in a restricted sense. The word *rukba* used in this connection implies a servitude.

Where a gift is made to a minor according to the Hanafi Law, the possession of any person in whose protection the infant is living is sufficient. Among the Shiahs there are two divergent views. According to the Mohakkik, possession should be taken on behalf of the minor by a person legally authorised to do so, or by the Judge. According to the Shaikh and the Usûli jurists, the possession of any person who is a guardian *de facto* is sufficient. But even, according to the *Sharâya*, where possession has been obtained and held on behalf

[1] 11 Moo. I. A., p. 517; S. C. I. L., 8 Cal., p. 1.

of a minor, by a person other than the father or the grandfather (or their executors,) who are the guardians *de jure*, the Court will not allow the gift to a minor to be invalidated.[1]

The reciprocal consent of the parties and the delivery of the object into the hands of the donee suffice to validate a gift.

There is no particular formula prescribed for the purpose of constituting a gift. If the act or declaration of the donor unequivocally explains his intention it is sufficient. Thus the following words, "I have given," "I have made a present," "I have yielded the full proprietorship of such an object to such a person," may be used for the constitution of a gift.

The validity of a gift is established if the donor declares that he has made the gift, and has delivered the thing to the donee, even if the object in question were at that moment in the possession of the donor.[2]

Where delivery of possession not necessary.

If the thing given is in the hands of the donee at the time of the contract no further seisin is necessary.

Nor is express transmutation necessary in the case of a gift by a father or grandfather to an infant child, for their possession is tantamount to the minor's possession, and such "persons being qualified to constitute a gift and receive it in the name of the infant donee."

Where the donee is a minor, and cannot himself take possession of the subject of the gift, the donor may nominate trustees to whom the property should be delivered for the minor.

Gift of *mushâa* valid.

The Shiah Law does not recognise the objection founded on *mushâa*, viz., that the subject of the gift forms part of a property capable of division. Where a gift is made to two different donees, they do not become conjoint possessors; each becomes proprietor of the part that is given to him, when both have accepted the gift. Where the acceptance is by one of the donees only, the gift is valid with regard to him but inoperative as regards the one who has refused.

A father may validly give preference to one or more of his children over the others by making a gift, but such gift constitutes an act from which it is recommended to abstain.

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[1] The point has been decided in accordance with this rule by the Calcutta High Court

[2] *Jawâhir-ul-Kalâm.*

A gift made to the direct ascendants in the first degree of the donor and to one's descendants and accepted by them is irrevocable.

The irrevocability of a gift made to blood relations other than the father and the mother and children is likewise admitted. Married couples are like relations by consanguinity.

A gift made to a stranger is revocable, while the thing which constitutes the gift is in existence.

Where the object given has perished, the gift cannot be revoked.

A gift is also irrevocable, if the subject-matter of the gift has been sold for whatever price, or otherwise alienated by the donee.

A sale by the donor of the subject-matter of the gift, after transfer of possession has taken place (expressly or constructively,) is null, if the donee be a relative by consanguinity. Similarly, if the donee be a stranger (*i.e.*, not a relative by consanguinity,) if he had given anything in exchange for the gift.

In the case of a gift to a stranger, where possession has been transferred, but no consideration has been given, the sale is null, because the donor has sold a thing of which he was not the proprietor at the time of sale. According to some jurists, this sale remains valid, the donor having in this case the right of revoking the gift ; but the former opinion, says the Mohakkik, seems more correct.

Sale by the donor of the thing given remains valid if the gift is annulled for illegality.

The two preceding principles are applicable to a sale by an expectant heir of property belonging to his ancestor, whom he believes to be alive, for the sale would be valid if it should appear that the ancestor was actually dead at the time.

A gift is constituted from the time of the seisin or transfer and not from the date of the contract, that is, all the legal incidents, the rights and obligations arising from the gift accrue from the date when the donee takes possession of the thing given.

This is contrary to the case of a bequest, the right to which accrues to the legatee at the moment of the testator's decease though the transfer may take place afterwards.

In case of a contest between the contracting parties, the donor purporting to have in fact constituted the gift but alleging that he has not delivered it, his declaration will be accepted, but if the donee affirm that the object was legally delivered to him the donor will have to establish his statement by proof.

So also if a person were to say "I gave him and made him the proprietor of it," and then deny having delivered possession. For it is possible that he may have made the second statement (*i.e.*, "made him the proprietor of it") by way of re-affirmance of the first, (*i.e.*, "I gave it to him,") and may not mean to imply actual transfer.

In case of a revocation no indemnity is due to the donor, if the object constituting the gift has suffered any injury.

In case of revocation, if the thing given has attained in *itself* any increase in integral value, this augmentation accrues to the donor.

When the increase or accretion after the gift can be separated from the original subject of the gift, it belongs to the donee, but any accretion before the seisin of the donee is the right of the donor in case of revocation.

A gift made without any reserve is always presumed to be made gratuitously.

Should the donee on his side give anything to the donor, the gift would be irrevocable.

A gift made on condition that the donee should make some present or offer some gratuity or service to the donor is valid; the gift will be revocable only if the donee do not fulfil the condition imposed.

Where the present or gratuity which the donee must give, or the benefit which he must render, is not definite, he is free to fix it according to his own wish, and the acceptance by the donor of such present or gratuity from the donee makes the gift irrevocable.

The donee in the cases mentioned in the preceding paragraphs cannot be compelled to give the present which has been fixed upon; he has the right to refuse it, but then the donor preserves the faculty of revoking the gift.

If in the preceding case, the refusal of the donee has caused the revocation of the gift, he is not held responsible for the destruction or the depreciation of the object given; for he has disposed of a thing, the proprietorship of which has been legally transferred to him.

There is some difference of opinion regarding the power of revocation possessed by the donor in the case of a gift of a piece of cloth, which subsequently to the gift has been dyed by the donee. Those lawyers who hold that the use by the donee of the subject-matter of the gift debars the right of revocation are of opinion that the dyeing of the cloth puts an end to that right; others, who

do not hold that view, think dyeing not to be an impediment to revocation, but that the donee only becomes entitled to the value of the dye and to retain a lien over the cloth for such value.

A gift made during a serious illness is valid if the donor recovers; if he dies it is valid only with the consent of the heirs, and if they refuse, it is valid only to the extent of one-third of his estate.

Section II.
Gift of a Debt.

As regards the gift of a debt to the debtor himself, I have already pointed out the difference between the Shaikh and the Mohakkik. The difference is not one of a mere antiquarian interest, for in one instance at least it has given rise to considerable practical results.

The Shaikh has stated in the *Mabsût*—"When some person has a *mâl* owing from another, and makes a *hiba* of the same to that other, it is an *ibrâ* (release) in the word *hiba*. And whether for the validity of a release, the acceptance of the person released is requisite or not, there is a difference of opinion. One body [of Jurists] holds that for the validity of an *ibra*, such acceptance is necessary; and so long as the person released does not accept it the release is not valid; and when not accepted, the right remains intact. And this view is correct [*lit.* strong], in my opinion, for when one person has a right against another, to discharge it is to confer an obligation; but nobody can be compelled to accept an obligation, otherwise [the result will be] though he does not accept, he will be forced to accept. [For that reason also] in the case of a gift of *ain* (specific property) it is required that there should be acceptance; and without acceptance a *hiba* is not valid. Another body says that the *ibrâ* is valid, whether the person who is liable accepts it or rejects it."[1]

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[1] اذا كان له في ذمة لرجل مال فوهبه له ذلك كان ذلك ابرآء بلفظ الهبه و هل من شرط صحه الا برآء قبول المبراء ام لا قال قوم من شرط صحته قبوله ولا يصح حتى يقبل و مالا يقبل فالحق ثابه بحاله و هوالذي يقوي في نفسي لان في ابرآئه اياه من الحق الذي له علده منه عليه ولا يجبر على قبول المنه فاذا لم يعتبر قبوله اجبرناه على ذلك كما نقول في هبه العين له انهالا تصح الا اذا قبل و قال قوم انه يصح شاء من عليه الحق اوابي-

Similarly, the jurist Abû Zuhra states in the *Ghunia*, that "if a person were to make a gift to another of what is due to him, that is a release by the word *hiba;* it is necessary, however, that the person from whom the debt is owing should consent to such discharge, for a discharge is conferring an obligation on the debtor, and there is no compulsion in the acceptance of a mere obligation."[1]

The Mohakkik in the *Sharâya* expresses a different opinion. He states that the gift of a debt to the debtor himself is valid and operates as a release, and "in release (*ibrâ*), acceptance (by the donee) is not a condition according to the correct view."[2] The "correct view" seems to be his own opinion. The author of the *Jawâhir*, after giving the dicta from the *Mabsût*, the *Ghunia*, the *Sarâir*, the *Intisâr* and other works of high repute both among the Usûlis and Akhbâris, says that the opinion of the Mohakkik refers only to cases where the obligation is one-sided; for example, where one person owes to another a sum of money, the creditor may release or discharge the debtor, and in order to effectuate such a discharge, the acceptance of the donee (the debtor) is not a condition precedent. But when the creditor has also certain obligations to perform, his discharge of the debtor (without the debtor's consent) would not absolve him from the liabilities to which he is subject. For example, if *A* agrees to pay to *B* 500 dirhems, on the condition that *B* should supply him for five years with the fruit of his garden, unless the contract is put an end to by mutual consent, a release by *B* to *A* in respect of the 500 dirhems, would not absolve *B* from the liability of supplying the fruit for the period agreed upon. Again, suppose *A* contracts to serve *B* for five years on condition of receiving a monthly stipend of five dirhems, and *B* without the consent of *A* and before the expiration of the period, declares that he has no need for the service of *A*, in such a case he would not be absolved from the liability of paying the stipend fixed upon for the full period.

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[1] اذا وهب لم يستحقه في الذمة كان ذلك ابراء بلفظ الهبة و يعتبر قبول من عليه الحق لانه في ابرائه منه منة عليه ولا يجبر على قبول المنة -

[2] *Sharâya-ul-Islâm*, p. 242.

Viewed in the light in which the author of the *Jawâhir* puts it, the opinion of the Mohakkik would seem to be little different from that of his great predecessor; for the Shaikh and his disciples only say that a discharge cannot be given effect to against the will of the obligor: he may accept it or reject it; his acquiescence is tantamount to acceptance.

But the dictum in the *Sharâya*,[1] though not open to much criticism, as explained above, has given birth to a startling doctrine. Among the Akhbâri Shiahs or a certain section of them, temporary contracts of marriage (*mutaa*) are recognised as valid. A man and woman may, according to them, enter into a contract of marriage for any period mutually agreed upon. The term (*muddat*) may vary from a day to a hundred years. In such marriages, the husband has no power of divorcing the wife; the contract being for a stipulated period fixed by mutual consent, comes to an end either by the efflux of the time so fixed, or by the death of either of the parties. They may, however, dissolve the convenient relationship by mutual consent. This restriction on the power of divorce in marriages for stipulated periods seems to have proved irksome to some of the Akhbâri legists, and thereupon they hit upon a device, the ingenuity of which is equalled by its injustice. 'In order to effectuate a discharge or release (*ibrâ*), the consent of the debtor is not necessary; the wife in a *mutaa* marriage is only a debtor, the husband is the creditor, *ergo*, the husband can "give away" the term or any portion thereof without the wife's consent.' So argued these learned legists, and this argument is to be found word for word in the *Sharh-i-Lumaa*. If this argument be correct, a man might induce a woman, of whose person he cannot otherwise possess himself, to enter into a *mutaa* marriage for a period of 100 years, which is tantamount to a life-long contract, and after satisfying his lust throw her off at any time he likes—by simply declaring that he has made "a gift of the term." The doctrine referred to above, however, has received judicial recognition in the case of *Kamar Kadr* v. *Bibi Luddun*.[2] The facts of this case were as follows:—The plaintiff, Kamar Kadr, married the defendant, a young unmarried woman of respectable parentage by the *mutaa* form

[1] I am referring to the opinion of the Mohakkik.

[2] I L., 14 Cal., p 236.

for a period of 50 years. A few weeks after the marriage he abandoned her, and on her suing him for maintenance alleged that he had married her for two months and a half only. This was found to be untrue, and he was ordered, under the provisions of the Criminal Procedure Code, to pay the maintenance. He then brought a suit to have it declared that the marriage relationship had been dissolved by his giving up the term, and that consequently he was not bound to maintain the woman. There was no allegation of infidelity or misconduct against her. The defendant pleaded that under the law of her sect, the husband could not dissolve the union, as alleged by him, of his own motion, and that even if he could do so, he was not absolved from his liability to maintain her, he having agreed to do so at the time of the marriage. After a varied fortune, the case came up to the High Court of Calcutta, and the learned Judges there held that the *Mabsût* was an old work and could not possibly have been known to the parties, but that the *Sharâya* was a later work and better known in this country and therefore more binding. And they accordingly held, with the aid of the gloss of the *Sharh-i-Luma*, that the husband, though he has no power of divorce, may still divorce by giving up the term. They did not decide the other question raised by the defendant, that the husband was not absolved from his liability to maintain her by virtue of the agreement entered into at the time of the marriage.

CHAPTER VI.

THE LAW OF GIFTS ACCORDING TO THE SHAFEI DOCTRINES.[1]

A GRATUITOUS transfer of property is called a gift. When such a transfer is made with the object of receiving reward in another world, it is a *Sadakah*; when made with the object of testifying respect for the donee it is a *hadia* or present. The condition, essential to the validity of a *hiba*, is that there should be an offer on the part of the donor and acceptance on the part of the donee in terms, though in the case of a present, it is not necessary that the offer or acceptance should be express; it is sufficient if the object is brought by the donor, and the donee takes possession thereof. A gift may be constituted by the use of the following expressions:—"I wish you to inhabit this house of mine, and after your death it will go to your heirs;" "I wish you to inhabit it;" (this is according to the doctrine embraced by Shâfei in his second period,) or finally by saying "after your death it will revert to me." On the subject of the validity of a gift made in the following terms, Shâfeï held a different view in his second period from that he entertained before; "I grant you the usufruct of this house for life," or "I make a gift of it to you for life, that is to say, in case of your predecease, it will revert to me, and in case of my predecease, it shall be irrevocably yours." However, in our time both opinions of the Imâm are equally in force in "our doctrine," and whilst some regard such gifts as valid, others hold them invalid. The former opinion is preferable.

Anything which may form the subject of sale or barter may form the subject of gift; but every object not subject to sale such as a thing usurped or unknown, or an animal that has escaped is not

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[1] The following principles are taken chiefly from the *Minhâj ut-Tâlibîn*, but are by no means exhaustive

capable of being made a gift of. The gift of a debt involves the remission of the debt; if it is made to the debtor it is valid; but if made to a third person, it is open to question. According to some, it is valid.

As for the proprietorship of the object given it is only transferred when the donee takes actual possession of the subject of the gift, with the donor's consent. When one of the parties dies between the making of the gift and the taking of possession, his heirs are placed in his position.

It is laid down by the traditions that parents, provided they are not notoriously bad characters, have the power to divide their property equally among their children by donations *inter vivos* without distinction of sex, though others hold that they should not thus destroy the effect of the rule relating to succession.

A father has the right of revoking a gift made by him to his children, provided the donee has not irrecoverably disposed of the object received. So also other ascendants with respect to gifts made to grandchildren and their descendants. But where the donee makes a disposition which leaves the right of proprietorship intact, like mortgage, conditional gift (at least so long as possession has not passed), conditional enfranchisement, or, even according to our doctrines, a contract of lease, the right of revocation is not lost. In case the donee should have lost the proprietorship of the object beforehand and should recover it subsequently, the right of revocation is not revived, and if in the meanwhile there has been an accretion to the subject of the gift, the revocation can only take effect if the increment has become incorporated with the object, but not where the increment exists separately. A revocation may be made in the following terms: "I revoke my gift," or "I reclaim the object," or "I wish the object to become my property again," or "I wish to break my gift," but it cannot be made impliedly by a subsequent disposition of the thing given, such as by sale, *wakf*, gift to another person or enfranchisement.

If a gift is made with the express stipulation that there should be no consideration, the right of revocation is not accorded to any one but the ascendants, whereas a gift with no such stipulation is supposed to have been made without hope of consideration if the donee is in any way inferior in social position to the donor, and even if he is superior. Our doctrine goes still further; it accepts

the same principle if the two persons are quite equal. Where a consideration is obligatory, but has not been settled at the time of the contract, it must be of the value of the thing given ; and, under these circumstances, the donor has the right to revoke the gift if the donee neglects to pay the consideration.

The validity of a gift made on condition of a fixed consideration is permitted ; the gift must, however, be considered like a sale ; but, according to "our doctrine," a gift made on the especial condition of an unfixed consideration is null and void.

In the case of a present made to somebody, the thing in which it is delivered is considered as part of the present, and where it is customary need not be returned, *e.g.*, the basket that contains dates is not returned. Otherwise the package remains in the hands of the donor, and the donee can make no other use of it than in using it (for that specific purpose) ; for example, a dish for eatables presented, provided that custom admits of such use.

CHAPTER VII.

THE HANAFI LAW RELATING TO *WAKF* OR TRUSTS.

Section I.

General Observations.

The law relating to Trusts is by far the most important branch of the Mahommedan Law. The doctrine has been recognised and enforced in the Mahommedan system from the earliest times. Historically its origin is traced to the direct prescriptions of the Prophet. "The validity of *wakfs*," says the *Ghâit-ul-Bayân*, "is founded on the rule laid down by the Prophet himself under the following circumstances, and handed down in succession by Ibn Auf, Nâfè and Ibn Omar as stated in the *Jâmaa-i-Tirmizi*. Omar had acquired a piece of land in (the canton of) Khaibar, and proceeded to the Prophet and sought his counsel, to make the most pious use of it, (whereupon) the Prophet declared, 'tie up the property (*asl*—*corpus*) and devote the usufruct to human beings, and it is not to be sold or made the subject of gift or inheritance ; devote its produce to your children, your kindred, and the poor in the way of God.' In accordance with this rule Omar dedicated the property in question, and the *wakf* continued in existence for several centuries until the land became waste." The author of the *Fath-ul-Kadîr*, a work of great authority among the Sunnis, states that the law of *wakf* has its origin with the Prophet himself, who, besides having prescribed the above rule to Omar, is reported to have declared that all human actions end with the life of the individual, except such benefactions as are perpetual in their character ; and that, in accordance with these principles, trusts or dedications were frequent in the lifetime of the Prophet and the early centuries of Islâm. The author gives examples of such *wakfs*, some of which were in existence at the time when he was writing his work, *e.g.*, the *wakf* by the Prophet himself of a piece of land which

he had acquired in the canton of Khaibar for the support of travellers ; the *wakf* of Omar of the land called *Summagh* in the same canton for his childrên, kindred, and the poor ; of Zobair ibn Awwâm[1] for his daughter ; of Arkam in favour of his son ; of Abû Bakr[2] in favour of his children ; of Saad ibn Abu Wakkâs[3] of his lands in Medina and Egypt for his children "which still exists" ; and of Osmân[4] of his lands called *Baruah*, "which still continues."[5] The doctrine of *wakf* is thus interwoven with the entire religious life and social economy of the Mussulmans.

Trusts in the Mahommedan system may, for the sake of convenience, be divided under three heads, *viz.*, public, *quasi*-public and private. This will probably indicate the division adopted by the Arabian jurists, who group *wakfs* or trusts under the following three heads, *viz.* :—

(1) Trusts in favour of the affluent and then for the indigent.[6]

(2) Trusts in favour of the affluent and indigent alike.

(3) Trusts in favour of the indigent alone.

Trusts for public works of utility which are dedicated to the public at large, though classed under the first head, have a distinctive name. They are called *wakfs* for *masâlih-i-aâmma*, and differ in one feature from other *wakfs*. For example, a bridge constructed by a private individual and dedicated as a public highway for the *people at large* without any restriction, comes under the direct control or supervision of the Sovereign (Sultan) and his representative, the Kâzi, whereas in the case of other trusts the Kâzi can interfere only at the instance of some of the beneficiaries. So in the case of a *Masjid-i-Jâmaa*, the public mosque, whether erected by the sovereign or a private individual, which is peculiarly under the supervision of the Kâzi.

These *masâlih-i-aâmma* I designate as public *wakfs*. But there is a large body of trusts which without being public trusts, partakes something of that character. I have thought it expedient to include them under the head of *quasi*-public *wakfs*.

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[1] A nephew of the Prophet.

[2] The first Caliph.

[3] The Conqueror of Persia under the Caliph Omar.

[4] The third Caliph.

[5] See *post*, Chapter on The *Moukoof alaihim*.

[6] *Radd ul-Muhtâr*, Vol III, p. 552.

By *quasi*-public *wakf*, therefore, I mean those trusts, the primary and initial object of which is, partly, to provide for a general pious purpose, and, partly, for the benefit of particular individuals or class of individuals which may be the settlor's family.

By private *wakf*, I mean those trusts the primary object of which is to make a provision for the *wâkif's* family or relations.

Wakafa literally means "I have bound up or detained" and is applied to the tying up of animals, such as, a horse or camel. Technically, or as the Arabian jurists put it, "in the language of the law," it signifies the dedication or consecration of property, either in express terms or by implication, for any charitable or religious object or to secure any benefit to human beings.[1] To use the curt but expressive language of the Moslem lawyers a "dedication to any good purpose [*wujûh-ul-birr-wa'l-ishâ'a* of the Shiahs, or *wujûh-ul-khair* of the Hanafis] is a *wakf*." The terms *birr* and *khair* include all good and pious acts and objects.[2] To make a provision for one's self is regarded by Hanafi lawyers as an act of *khair*, for the Prophet declared a man giving a subsistence to himself as giving charity,[3] and settlements upon one's family are approved of and regarded as lawful by all the schools. In the case of *Mohammed Sadik* v. *Mahommed Ali and others*,[4] the Law Officers of the *Sudder Dewamy Adawlut* stated that *wakf* according to the opinion of Abû Yusuf and Mohammed (which on this point is adopted as law,) implies *the relinquishment of the proprietary right in any article of property such as lands, tenements and the rest*,[5] *and consecrating it in such manner to the service of God that it may be of benefit to men, provided always that the thing appropriated be at the time of appropriation the property of the appropriator.*"[6] This definition I shall explain fully later on.

Mohammed Sadik v. *Mahommed Ali & others.*

Abu Hanifa's opinion.

According to Abû Hanîfa, the legal meaning of *wakf* is the detention of a specific thing in the ownership of the *wâkif* or appropriator, and the devoting of its profits in charity on the poor or

[1] *Hed* II (Ar.), p. 887, *Ghâit-ul-Bayân*, *Fath-ul Kadîr*.

[2] *Hed* II (Ar.), p 888, see *post*.

[3] *Hed* II (Ar.), p 891.

[4] Sel Rep. I, p 17

[5] *Waghaira*, this does not mean suchlike things, but other objects.

[6] Sel. Rep I, p 18.

other good objects[1] in the manner of an *ârîat* or commodate loan,[2] but not being absolute in its nature, it is revocable by the *wâkif*, and he is at liberty to dispose of it according to his own will. Abû Hanîfa, further, thought that the right of the appropriator was extinguished only after the Judge had made his decree, and the mode in which such a decree could be obtained was, suggested Abû Hanîfa, for the appropriator to deliver the subject of the *wakf* to the *mutwalli* or curator and then demand it back on the ground that the *wakf* was not binding [on him], whereupon the Judge would pronounce his decree holding the dedication to be obligatory, and it would then become so. This primitive and unpractical notion was never accepted as law among his followers. In the *Fath-ul-Kadîr*, Abû Hanîfa's notion has been combated and refuted by *hadîses* from the Prophet himself. As the author of the *Radd-ul-Muhtâr* points out, Abû Hanîfa's views are accepted by the sect only in devotional matters. His crude and archaic legal conceptions never received acceptance anywhere. For purposes of judicial decision, the enunciations of his great disciple Abû Yusuf, the Chief Kâzi of Bagdad under Hârûn-ar-Rashîd, a man of versatile talent and strong common sense and gifted with a practical knowledge of the world, are recognised as law[3] throughout the Sunni world.

Abû Yusuf's rule, recognised as law.

According to Abû Yusuf, *wakf* is the detention of a thing in the implied ownership of Almighty God, in such a manner that its profits may be applied for the benefit of human beings, *and the dedication when once made, is absolute, so that the thing dedicated can neither be sold, nor given, nor inherited.* Mohammed, the fellow-disciple of Abû Yusuf, agrees with him on this point, but he thinks that the right of the *wâkif* does not cease in the property until he has appointed a *mutwalli* or curator and delivered it into his hands.

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[1] *Hed* II p 891

[2] Hed II (Ar). p 887 *Âârîat* is resumable at the will of the lender. Mr Baillie's note on this subject is worth inserting here

"This does not mean that the profits are merely to be lent but that the objects of the *wakf* are to have the same benefit from it as if the subject of it were lent to them in the manner of an *ariat*, when they would have the use of it, or, in other words, its profits or usufruct for their own benefit so long as it remained in their possession" Baillie's Dig. 2nd Ed., p 557

[3] *Fatâwa Alamgiri*, Vol. II, p. 454, see *post*.

According to Abû Yusuf, the dedication becomes absolute and the right of the person making it becomes extinguished by the mere fact of his declaration that he dedicates it, or has dedicated it.[1] This rule of law laid down by Abû Yusuf is in force among all the Hanafî jurists. In fact, Abû Yusuf's views on the doctrine of trusts and the principles governing *wakfs* are universally recognised by the Hanafî Sunnis all over the world, with the exception of Bokhara. In India, the law applicable to *wakfs* created by Hanafî Sunnis is based on the enunciations of Kâzi Abû Yusuf and the *Fatâwa Alamgiri*. The great Digest prepared under the command of Aurangzeb expressly declares that "decrees in this country are given according to Abû Yusuf." Mohammed's views were adopted only by some of the Bokhariot schoolmen and have no application in any other part of the Sunni world.[2]

The *Fatâwa Alamgiri* follows Abû Yusuf.

Section II.

Conditions relating to the Wakif.

"The same conditions which are essential for the validity of mere acts of bounty," says the *Fath-ul-Kadîr*, "are requisite to the valid constitution of a *wakf*, that is, the *wâkif* must be free, must be adult, and must be possessed of understanding." "It is also a condition," adds the author, "that it should not be dependent for its operation upon a contingency which may or may not happen."..."For example, if a man were to say 'this land of mine will become dedicated if my son arrives at home on such a day,'

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[1] In Fulton, p 345, the learned Judges distinctly said that according to the modern doctrine of Mahommedan decisions and lawyers, Abû Yusuf's opinion on this point is considered better law.

[2] *Tus-hîl.* Mr Baillie has entirely misconstrued the passage in the *Fatâwa Alamgiri* (Vol. II., p. 455) in saying that decisions are both ways. The passage in question affords no warrant for that construction. It runs thus:—"According to Abû Yusuf the right of the *wâkif* becomes extinguished immediately on the declaration, and that also is the opinion of the three Imâms [Mâlik, Shâfeï and Hanbal] and of the bulk of the learned, and is followed by the Jurists of Balkh, and on that is the *Fatwa;* so in *Fath-ul-Kadîr* and *Muniah.* And on that is the *Fatwa*, so says the *Sirâj-ul-Wahâj* also."

"Mohammed said that the right is not extinguished until the *wâkif* consigns the property to a trustee, and the *Sirâjia* says the *Fatwa* is thereon ; and so also the *Khulâsa.*" As I shall show later, the law laid down by Abû Yusuf is in force universally among the Hanafi Sunnis.

the land will not become dedicated even should the son arrive on that day."[1]

As a general rule, it may be stated that all persons who are competent to make a valid gift are also competent to constitute a valid *wakf*. The consecrator must be (1) free, *i.e.*, not a slave ; (2) must be sane ; and (3) must be adult, in other words, must have attained that age when, according to his personal law, it would be presumed he has acquired sufficient discretion or understanding to comprehend the nature of his act.

All the schools are agreed respecting the capacity of the *wâkif*.

"And of the *wâkif*," says the *Sharâya*, "it is required that he be of full age, sound understanding, and unrestrained in the use or disposition of his property." So the *Fatâwa Alamgiri*,—"among the conditions (of *wakf*) are understanding and puberty (on the part of the *wâkif*,) as a *wakf* by a boy or an insane person is not valid." But the action of a mere imbecile is not absolutely invalid. "If a person who is imbecile," says the *Radd-ul-Muhtâr*, "makes a *wakf* upon himself and after him upon some other purpose which does not fail, it is valid according to Abû Yusuf, but the latter will take effect only upon its being sanctioned by the Judge."

Where, therefore, a person, who, without being absolutely *non compos mentis*, is so weak in intellect, that he cannot understand the nature of his acts, makes a *wakf* in his favour with remainder in favour of others, such *wakf* is valid so far as the settlement on himself is concerned, and with regard to the remainder it would be valid with the sanction of the Judge.

Any person who is sane and adult may constitute a *wakf*. But the same circumstances which may avoid a gift, *viz.*, undue influence (*ikrâh*,) fraud, or want of comprehension may avoid a *wakf*. In the case of *Delroos Banoo Begum* v. *Nawab Asghur Ally*,[2] the appellant had, in the year 1852, executed a *wakf-namah* dedicating all her properties for certain pious purposes. Upon a suit by the respondents to remove her from the management of the *wakf* on the ground of misfeasance, the High Court held as follows :— *Delroos Banoo Begum v. Nawab Asghur Ally.*

"The Judge holds that the defendant cannot now be allowed to say that she misunderstood the effect of the words she used or of the acts by which she consummated the *wakf*, and under ordinary

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[1] See *post*

[2] 15 B. L. R., p 167

circumstances no doubt a person would be rightly presumed to have known the consequence of his own deliberate act, but in this case the matter is somewhat different. The defendant is a *pardanashin* Mahommedan lady, unable to read and write and generally ignorant as are most of her class; she has been examined, and she swears positively that she did not understand the meaning of the deed which she executed. She admits her wish to keep her estate for the purpose of perpetuating certain ceremonies in memory of her mother, and out of the hands of her legal heirs, and that to this end she, by the advice of her confidential servant Ali Jameen, signed a deed which she was told would have that effect. She swears positively that the *tauliatnamah* was only read over to her in Persian, a language which she did not understand, and that she had no idea of divesting herself by it of her proprietary rights. No evidence has been given to rebut this statement; only one witness to the *tauliatnamah*, Abdool Azeez (summoned by the defendant) has been examined, and he does not prove that the deed was ever read to the Begum in Hindustani, a language which she understood, or that its purport was explained to her. Her own acts have been, from the first, absolutely inconsistent with a knowledge that she had divested herself of her rights as proprietor by the *tauliatnamah*. From a time shortly after its execution we find her dealing with the property just as if it were still her own, selling, buying, borrowing, granting mukurari leases and exercising all the usual rights of ownership, and making everything as public as possible by registering the documents affecting those conveyances. I find, moreover, that long after the *tauliatnamah* was executed (namely, in 1871), the Collector of the 24-Pergunnahs gave pottahs to Delroos Banoo Begum, and this is a further argument in favour of the property never having been considered an endowment for public purposes under Regulation XIX of 1810, and treated her as the proprietor of her estate. It is, moreover, hardly likely that had Delroos Banoo Begum known what was the real effect of making a *wakf*, she would have headed her receipts for rents paid by the ryots with her name as mutwalli and a description of the estate as a *wakf* mehal, and still have gone on disposing of the property at her pleasure, and as if she had made no *wakf* at all. From first to last, as it seems to me, her acts denote a person endeavouring to make such an arrangement of her pro-

perty as would defeat the claims of her heirs and permit of the estate being retained for particular purposes, but always considering that she still retained the right to do what she pleased with the property so long as she lived."

But when a *wakf* has been created by a formally registered document by a person who is *sui juris*, and there is no reason to suppose that the settlement has been brought about by undue influence or fraud, it will not be set aside. Nor, when a *wakf* is created in express terms, can the *wâkif* turn round afterwards and say that he did not know the meaning of the word *wakf* or that he did not intend to create a *wakf*.[1] In *Fatima Bibi* v. *The Advocate-General*,[2] it appeared that the plaintiff, a Mahommedan lady of the Sunni sect, by an indenture dated the 16th of November 1866, conveyed all her properties in trust for the purposes set forth in the deed, primarily for herself and her children and other descendants and ultimately for the poor. In 1881 she desired to revoke the trust. Upon a case stated under Sec. 527 of the Civil Procedure Code, West, J., held as follows :—

Fatima Bibi v The Advocate-General.

"A *wakf* must be certain as to the property appropriated, unconditional and not subject to an option. It must too have a final object which cannot fail, and this object it seems must, according to the better opinion, be expressly set forth. In the deed now in question it is set forth, and the reserve to the plaintiff for her life of the annual profits does not invalidate it, as such a consequence arises only when there is a provision for the sale of the *corpus* of the property and an appropriation of the proceeds for the donatrix. In the case of *Delroos Banoo Begum* v. *Nawab Syud Ashgur Ali*, a dedication of property in *wakf* was declared invalid on the ground that the donatrix, an illiterate woman, though a wealthy one, had not really known what she was doing in endowing the imambarah. The imambarah was within her own house, she had appointed herself joint mutwalli and her co-mutwalli had died. The property had never been treated as dedicated to a public religious establishment within the meaning of Act XX of 1863. Everything went to show that there had not been a true dedication, but the learned Judge, who pronounced the decision of the Court, said that if the instrument of *wakf* had been 'really and knowingly executed by

[1] See *post*.

[2] I L R, 6 Bombay Series, p 42

the lady defendant, it would have bound Delroos Banoo Begum without the power of revocation.' In the present case the direct ownership of the property was completely parted with. There was, it is said, a want of discretion on the part of the plaintiff, and certainly a dedication made by a girl of fourteen is not to be upheld without enquiry, but here the transaction was never questioned by the plaintiff's husband during his life, and the plaintiff herself has for fifteen years confirmed her own early act by a continued acceptance of the profits of the estate from the trustees. She cannot now say with any reason that the dedication was invalid on account either of its ceremonial defects or of a want of an effectual accompanying volition."

Islâm not necessary.

Islâm is not a necessary condition to the constitution of a *wakf* or for making a dedication. Any person of whatever creed may create a *wakf*, but the law requires that the object for which the dedication is made must be lawful according to the creed of the dedicator as well as the Islâmic doctrines. Divine approbation being the essential element in the constitution of a *wakf*, if the object for which a dedication is made is sinful, either according to the laws of Islâm or to the creed of the dedicator, it would not be valid. Consequently, a Moslem cannot make a dedication in favour of an idol, a non-Moslem place of worship, or any other object which is recognised as unlawful or sinful in his law, nor can a non-Moslem validly make a dedication for a Moslem place of worship. But in either case the dedication may be effectuated by the consent of the heirs after the decease of the *wâkif*. The *Fatâwa* lays down the rule in a rather bald fashion :—" If a *Zimmi* should give his mansion as a *Masjid* or place of worship for Mussulmans and construct it as they are accustomed to do, and permit them to pray in it, and he should then die, it would become the inheritance of his heirs."[1] Stated in this form the rule is unintelligible, but the principle is explained, as I have mentioned above, in the *Fath-ul-Kadîr*. No person has a right to withdraw a portion of his property which would devolve upon his heirs, for purposes considered as sinful in his creed without the assent of the heirs whose rights are interfered with. Such assent may be given either at the time of the dedication or after the inheritance has opened. But where an object is not sinful

[1] *Fatâwa Alamgiri*, Vol. II, p. 526.

according to the laws of the dedicator (if non-Moslem) and is lawful according to the laws of the Moslems, the *wakf* is valid by *consensus*. For example, if a Christian were to make a dedication for a building where the Almighty God may be worshipped according to the rites of Islâm (without interfering in any way with his own residence), such a dedication would be valid. Similarly, if a Moslem were to make a dedication for Unitarian worship, such a *wakf* would, (I take it,) be in conformity with the principle enunciated in the *Fath-ul-Kadîr*.

Wakf by an apostate.

There is some difference of opinion about the validity of a *wakf* created by an apostate from Islâm. According to the jurist Ibn Shahna, all *wakfs* created by him in favour of the poor or for pious purposes of a *general* character remain operative. But *wakfs* created in favour of individuals, against the interests of heirs, are voided. According to others, all *wakfs* created previous to apostacy are avoided. The former view is preferred. But the *wakf* made by an apostate after his apostacy is valid.[1]

If a woman make a *wakf* and then apostatise, her *wakf* is not void.

The subject-matter of *wakf* must be the property of the *wakif*.

The subject-matter of the dedication must be the property of the *wâkif* at the time the *wakf* is made, that is, he must be in a position to exercise dominion over it.[2] Consequently, if a *wakf* is made by a person of some property of which he is in unlawful possession, but which he subsequently purchases from the rightful owner, such *wakf* is invalid. So also, when a man makes a *wakf* for certain good purposes of land belonging to another, and then becomes the proprietor of it, the *wakf* is not lawful; but it would become validly dedicated if ratified by the proprietor. Accordingly, when a person purports to make a *wakf* of property which does not belong to him, and such *wakf* is subsequently ratified by the true owner, the dedication is valid.

When a person makes a bequest of some property to another, and the legatee prior to the death of the testator and before the legacy has vested in him makes a *wakf* thereof, it is invalid. Nor can a *wakf* be made of property in which the full proprietary right has not vested in the person appropriating. There are certain exceptions, however, to this rule.

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[1] *Bahr, Radd-ul-Muhtâr*, Vol. III, p. 557.

[2] *Sautayra*, p. 360; *Fatâwa Alamgiri*, Vol. II, p. 457.

"If possession were taken of land given by an invalid gift, and it were then made a *wakf*, it would be lawful, the donee being responsible for its value; and if one should purchase by an invalid sale, take possession, and then make a *wakf* of the subject of sale in favour of the poor, the *wakf* would be lawful, subject to the like responsibility for its value to the seller, but if the *wakf* were made before taking possession it would not be lawful. When a man buys land by a lawful sale, and makes a *wakf* of it before taking possession and paying the price, the matter is in suspense until he pays the price and takes possession when the *wakf* is lawful; but if he die without leaving any property, the land is to be sold and the *wakf* is void, and if a right is established in the property, or it is claimed by a *Shafi* under his right of pre-emption after the purchase has been made, the *wakf* is void."[1]

From the above rules the conclusion follows that any property in the possession of a person under a conditional grant cannot be lawfully consecrated, unless the dedication is made with the sanction of the original grantor.

A person who owns a house on the property of another may lawfully dedicate the house, and such dedication will not be dependent on the sanction of the proprietor of the land.[2]

Wakf of property subject to a lease or mortgage is valid.

It is not necessary that the entire subject-matter of the *wakf* should be actually in the possession of the *wâkif* at the time of the *wakf*, for the consecrator may validly include in the *wakf* any property which he may subsequently acquire.[3] Nor is it necessary that the property which is dedicated should be entirely free from the rights or claims of other parties. Accordingly, a property which is leased out to tenants, or which is under mortgage, or held in pledge, can be validly dedicated.[4]

"It is not necessary," says the *Alamgiri*, "that there should be an entire freedom from the rights of other parties, as, for instance, in cases of pledge and lease, so that if one were to give a lease of his land and then to make a *wakf* of it before the expiration of the term, the *wakf* would be binding according to its conditions,

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[1] *Fatâwa Alamgiri*, Vol II, p 457

[2] *Ghâit-ul-Bayân*, *Surrat-ul-Fatâwa*.

[3] *Sautayra*, p 389.

[4] *Fatâwa Alamgiri*, Vol. II, p. 458; *Fath-ul-Kadîr*, Vol II, p. 640, *Tas-hîl*; *Ghâit-ul-Bayân*.

but the lease would not be void, and on the expiration of the term, the land would revert to the purposes to which it was dedicated. In like manner, if a man should pledge his land, and then dedicate it before redeeming it from the pledge, the land would not be withdrawn from the pledge, and if it should remain for years in the hands of the pledgee and then be redeemed, it would revert to the uses for which it was consecrated. And if the pledgor should die before the redemption, yet if he leave enough to redeem the land, it is to be redeemed and the *wakf* is obligatory. But if he should not leave enough for that purpose, the land may be sold and the *wakf* would become void. In the case of a lease, when either of the contracting parties dies it is void, and the land immediately becomes *wakf*."[1] When the land is sold for the payment of the mortgage-debt, it does not necessarily follow that the *wakf* would be voided in its entirety. The *wakf* would attach to the balance of the sale-proceeds after the payment of the debt.

The voidance of the lease on the death of the lessor or the lessee is a natural consequence of the principle of the Hanafî Law, which holds that a lease cannot last beyond the lifetime of the lessor or the lessee. In this country, however, where leases are binding upon the heirs and representatives of the lessor, and are often hereditary (like the *mouroosi mokurrari ijaras*), the principle stated in the text would not apply. Where, therefore, a piece of land which is already let in *mouroosi ijara* is dedicated, the *ijara* rent would be applied to the purposes of the *wakf* without interfering with the *mouroosi right*.[2]

As regards the statement that the *wakf* would remain as it were in abeyance during the existence of the lease, that refers only to the possessory right of the lessee. For example, if a man were to dedicate a piece of land which he has already leased to another, for the purpose of building thereon a mosque, or for any other purpose which would interfere with the possession of the tenant or lessee, the carrying out of that purpose would be postponed until the lessee has given up possession. But where the purpose has not that effect, in other words, where though the property is dedicated, the rents and profits arising therefrom are only to be

[1] *Fatâwa Alamgiri*, Vol. II, p. 458; *Fath-ul-Kadîr*, Vol. II, p. 638.
[2] *Radd-ul-Muhtâr*.

devoted to the purposes of the *wakf*, there is no such postponement, and the *wakf* takes effect at once.

Wakf of a person under inhibition.

The *wakf* of a person who has been placed under "inhibition" by the Judge is not valid. The proceeding of inhibition may be likened to a proceeding in bankruptcy. The Kâzi is authorised, at the instance of the creditors of a person, or any of his relatives or friends, upon proof of prodigality, want of mental capacity, or reckless borrowing, to place him under "inhibition,"—to declare him incapable of contracting further debts or engaging in any transaction, and to appoint a curator of his estate or business or trade. When such a *fiat* has been made against a person, he is said to be a *mahjûr*. A *wakf* by a *mahjûr* is invalid.

So long as a person has not been declared a *mahjûr* by the Kâzi, he has absolute power, if *sui juris*, to deal with his property in any way he likes. The effect of a consecration or *wakf* of a property by its owner is to extinguish absolutely and for ever all his rights therein. The act of consecration, which is irrevocable in its character, transfers the property for ever into the legal ownership of the Almighty for the benefit of His creatures. Thenceforth the *wâkif* has no power to deal with it in any way or burden it or create any charge over it. In short, it is no more his. If he happen to be the *mutwalli*, any dealing of his prejudicial to the interests of the *wakf* is a misfeasance, and the Kâzi on proof thereof would be bound to remove him. He cannot even borrow for the benefit of the *wakf* without the sanction of the Kâzi.

Consequently, any liabilities contracted by the *wâkif* after the *wakf* is created, cannot affect the *wakf*, and subsequent creditors have no right to question the consecration.

But though no act of the *wâkif* subsequent to the *wakf* affects its validity, if any right was attached to the property *before* it was dedicated, the consecration would not defeat that right. If the property was already mortgaged, and the mortgagor has no other assets from which the debt can be satisfied, the property in question would be sold, and the proceeds would be applied in the payment of the debt.

"If the mortgagor dies before the redemption of the mortgage," says the *Fatâwa Alamgiri*, "but leaves sufficient assets to redeem the property, the *wakf* is obligatory. If he has not left enough assets, the property may be sold and the *wakf* set aside."

As regards unsecured creditors, if the *wakf* is made *in extremis*, or when the person is labouring under an illness which ends fatally, and the *wâkif* leaves no assets from which his debts can be satisfied, in other words, dies insolvent, the Kâzi has the power to direct the payment of the deceased's debts out of the *wakf* property.

But there is some divergence of opinion as to the rights of those creditors, for whose debts no portion of the property dedicated is mortgaged, when the *wakf* is made by a person "in health,"—that is, by a person not labouring under an illness of which he eventually dies.

According to *Kâzi Khân*, the *Fath-ul-Kadîr*, the *Zakhîra*, the *Anfaa-ul-Wasâil*, the *Surrat-ul-Fatâwa* and other authorities, [unsecured] "creditors have no right in the property of their debtors." And a person, who has only a money claim against another and has not taken the precaution to get the property of his debtor hypothecated for his debt, has no right to question a *wakf* made by the debtor.

The text in the *Fath-ul-Kadîr* is as follows :—

"In the *Fatâwa Kâzi Khân*, it is laid down, that if a man labouring under a death-illness make a *wakf* and his debts surround [exceed] his assets, the property will be sold and the *wakf* will be set aside; this is contrary to the case of a *wakf* made by a person in health, although he may be immersed in debt, so that it exceeds his assets; the *wakf* in such a case is valid nevertheless, and the creditors cannot ask it to be cancelled if the *wakf* has been made before the *fiat* of the Kâzi declaring him to be a *mahjûr*; such a *wakf* is valid by *consensus*, for creditors[1] have no claim in the property of their debtor whilst in health."[2]

The text in the *Surrat-ul-Fatâwa* is as follows :—

"In the *Durrar* and *Ghurrar*,[3] Chapter on *Wakf*, it is laid down that if a person labouring under a death-illnes make a *wakf* of his

[1] Meaning unsecured creditors.

[2] في فتاوي قاضيخان مريض وقف و عليه د يون تحيط بماله - يباع وينقض الوقف الى قوله و هذا بخلاف مالو وقف المديون الصحيح و عليه د يون تحيط بماله - وقفه صحيح - لا ينقضه ارباب الديون اذا كان قبل الحجر بالاتفاق لانه لم يتعلق حقهم بالعين في حال الصحة

[3] Two important and well-known authorities

house, and it be found that his debts exceed his assets [lit. he is surrounded in debt], the house will be sold and the *wakf* will break; so also it is stated in the Chapter on *Wakf* in the *Khazânat-ul-Fatâwa*."

"In the *Zakhîra* it is laid down that when a man who is largely indebted and has a piece of land worth 10,000 dirhems makes a *wakf* thereof, and, with the object of throwing his creditors into difficulties, settles the produce of the *wakf* on himself, and witnesses prove that he is insolvent, the *wakf* will be valid, so will the testimony. The validity of the *wakf* is founded on the fact that the *wâkif* has a right over the property [in other words, if the property is not hypothecated, the creditors[1] have no right to question the disposition.] . . . . Any balance of the produce remaining over after providing for the subsistence of the *wâkif* can be taken by the creditors, for the produce is the property of their debtor . . . . . And in the Chapter on *Wakf* in the *Anfaa-ul-Wasâil*, it is stated that if a *marîz* [person labouring under a death-illness] makes a *wakf* will of his house, and he is so heavily involved in debt that his liabilities *surround* his assets, the house will be sold, and the *wakf* will be set aside. But if the debtor makes a *wakf* in health, and he is so involved in debt that his liabilities *surround* his assets, the *wakf* is nevertheless obligatory, if made before an order of inhibition by the Kâzi. And this is by *consensus*, and the creditors will have no right to set it aside, for they have no claim in the property of their debtor during his lifetime. So it is stated also in the *Fath-ul-Kadîr*; and the reference in the *Anfaa-ul-Wasâil* to the *Zakhîra* supports it."[2]

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[1] Unsecured.

[2] من وقف الدرر والغرر مريض وقف داره وعليه دين محيط بماله فانه يبيع الدار وينتقض الوقف كما لو اشتري داراً ووقفها ثم جاء الشفيع كان له ان ياخذ الدار بالشفعة (كذا في) وقف خزانة المفتين وفي الذخيرة رجل عليه ديون وله مديغة تساوي عشرة آلاف درهم فوقفها وشرط غلاتها لنفسه قصداً منه المماطلة وشهد الشهود على افلاسه جاز الوقف وجاز الشهادة اما جواز الوقف لمصادقة ملكه وجواز الوقف مع هذا الشرط قول ابي يوسف واما جواز

The *Radd-ul-Muhtâr* apparently takes a different view. In effect, it states that if a person is so heavily involved in debt as to be absolutely insolvent, and with the object of defrauding his creditors consecrates his property, the Kâzi has the power of not recognizing the *wakf*, and of compelling him to sell the property and pay his debts, so far as possible, with the proceeds of the same.

I will give the text *in extenso*. After commenting on the statement in the *Durr-ul-Mukhtâr*, that the *wakf* of an insolvent mortgagor is invalid, the author proceeds thus:—"This is a mistake; such a *wakf* is not *bâtil;* for in the *Asaâf* and other works it is laid down that if a person, after mortgaging a property and delivering it[1] to the mortgagee, were to dedicate it, it will be valid, and if he is possessed of [other] means, the Kâzi would constrain him to discharge the debt; but if he have no means, then the Kâzi would declare the *wakf* cancelled, and the property would be sold for the payment of the debt. Similarly, if the mortgagor die and leave other assets from which the debt can be satisfied, the *wakf* will be maintained, otherwise the property consecrated may be sold, and the *wakf* cancelled. So it is stated in the *Fath-ul-Kadîr* also."

"And if a person make a *wakf* in *Marz-ul-Mout* and die so involved that his debts *surround* his assets, in that case the property will be sold and the *wakf* will be cancelled . . . . . This is different from the case of a *wakf* made in health by a person against whom no inhibition has issued. The *wakf* of such a person is valid, though it may have been made with the object

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الشهارة فلانها صدق لان الرقبه خرجت عن ملكه فان فضل شيء من قوته من هذا الغلات فللغرماء ان ياخذوه منه لان الغلات تفدت على ملكه من وقف النفع الوسائل مريض وقف داره وعليه ديون تحيط بما له فانه تباع الدار وينتقض الوقف واما لو وقف المديون الصحيح عليه ديون تحيط بما له فان وقفه لازم لا ينقضه ارباب الديون اذا كان قبل الحجر بالاتفاق لانه لم يتعلق حقهم بالعين في حال صحته كما في فتح القدير ويوييده ما في النفع الوسائل مغرياً الى الذخيرة -

[1] There is no hypothecation under the Mahommedan Law without seisin

of throwing the creditors into delay, as he has dealt with his own property, so it is stated in the *Anfaa-ul-Wąsâil* from the *Zakhira*. In the *Fath-ul-Kadîr* it is stated that such *wakf* is obligatory, when it is made before inhibition, and by *consensus* the creditors[1] will have no right to set it aside, for creditors have no right in the property of their debtor during his lifetime unless hypothecated to them ; and in the *Khairiyèh* the *Fatwa* is given on this basis, and it is stated there that Ibn-i-Nujaim decreed accordingly. But as I shall show from the *Maarûzât* there is a difference [of opinion]" . . . . . .

"If the *wâkif* has made a *wakf* on himself and made a condition that his debts should be satisfied out of the income, the *wakf* is valid *with* the condition,[2] as Ibn-i-Nujaim has decreed, and the author of the *Durr-ul-Mukhtâr* says, that if the *wakf* is made on another with the same condition, both the *wakf* and the condition are valid." . . . . "Even if the *wâkif* make no such condition but the *wakf* is in his favour, any balance (over and above his necessary expenses) will be applied towards the payments of his debts. But if the *wakf* is on another, the produce will be given to him. So it is stated in the *Fatâwa-ibn-i-Nujaim*[3] . . . . . .

. . "In the *Maarûzât*[4] of Mufti Abû Saood it is stated that he was asked—'when a person makes a *wakf* on his children to escape his creditors and has no other property from which the debts can be satisfied, is such *wakf* valid', he answered, 'no, it will not be valid or obligatory, and the Kâzi has the power of not recognising such a *wakf* by a person who is absolutely sunk in debt to the extent of his assets' . . . . "What I have stated from the *Zakhîra* and *Fath-ul-Kadîr* is in conflict with this view, unless you restrict it to the *wakf* of a debtor making a *wakf* in death-illness. And in the *Fatâwa-al-Ismailia* it is stated that the Kâzi has the power of not enforcing such a *wakf* and of constraining him to sell the property and pay his debts, and this is what Moulâna Abû Saood states, and his enunciation seems approved."[5] This applies to the case of an insolvent debtor acting fraudulently.

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[1] Unsecured.

[2] In the case of *Luchmipat Sing* v. *Shah Amir Alum*, 9 Cal. L R., p. 176, the *wakafnamah* contained a provision to that effect, and it was held valid.

[3] Also called *Fatâwa-az-Zainiyèh*. See Morley's Dig, Vol. I, Introd., p cclxxxvii

[4] Expositions or Ordinances [5] *Radd-ul-Muhtâr*, Vol. III, pp 611-612.

The rule enunciated in the *Radd-ul-Muhtâr* from the *Maarûzât of* Mufti Abû Saood and the *Fatâwa-al-Ismailia* can be reconciled with the principle laid down in such high and recognized authorities as the *Fatâwa Kâzi Khân*, the *Fath-ul-Kadîr*, the *Zakhîra*, &c., with the light of the statement contained in the *Tanwîr-ul-Absâr*, which is to this effect, "the *wakf* of a person whose debts *surround* his assets should be maintained either by giving him time to pay off his debts or appointing a manager to realise the rents and profits and to pay the debts therewith." If it is wholly impossible to discharge it by that process, the Kâzi in that case has the option of directing the sale of the property consecrated.

In this connection it must be observed that the poor, who are the ultimate beneficiaries of every *wakf* made in favour of individuals, cannot be parties to any fraud, and, therefore, if possible, should not be prejudiced.

27 Elizabeth c. 4 did not apply to this country beyond the limits of the Presidency Towns, and section 53 of the Transfer of Property Act, which embodies the rule contained in section 2 of the English Statute, does not affect the provisions of Mahommedan Law.[1] And, consequently, when a person, who is not in insolvent circumstances, makes a *wakf* of any portion of his property, his subsequent creditors have no right to question that *wakf*, nor can a *subsequent* purchaser for consideration of the property in question, seek to set aside the *wakf*,—for once dedicated, the property ceases to belong to the *wâkif*, and he can no more burden it or sell it than if he were an absolute stranger.

It must be remembered also that a *wakf* is *not* a gratuitous transfer of property. It is a transfer to the legal ownership of the Almighty for substantial consideration, *viz.*, His reward, which is obtained the moment the *wakf* is created. As will be seen afterwards, a *wakf* takes effect like the emancipation of a slave. There can be no power of revocation nor can there be any reserve ; and neither the *wâkif* nor any person deriving title from him can say afterwards that he had no intention to make a binding and valid *wakf*.[2]

Wakf by a person suffering from a mortal illness.

In order that the *entire wakf* may be valid, it is necessary also that the *wâkif* should not be suffering from a mortal illness at

[1] See sec. 2, cl. d.

[2] *Ramz-ul-Hakâik*

the time of the dedication. In other words, the *wakf* of a person suffering from a mortal illness from which he dies takes effect as a bequest and operates with reference to one-third of the property of the donor. But the *wakf* of a person made during illness from which he eventually recovers is valid with reference to the whole.

"The *wakf* of a person suffering from a death-illness," says the *Radd-ul-Muhtâr*, "takes effect like the *hiba* of a person in that condition, *i.e.*, the *wakf* will operate as regards one-third of his estate. If the heirs, however, consent, it will take effect with reference to the whole. If some of the heirs consent, it will take effect in proportion to their shares." So also in the *Fath-ul-Kadîr*, "a *wakf* made in *Marz-ul-Mout*, 'takes effect,' says *Tahâwi*, 'like a *wasiut*' (a testamentary disposition").

Kâzi Khân following Imâm Abû Bakr Mohammed Ibn-ul-Fazl states that *wakf* is of three kinds in relation to the state in which it is made :

(1) Those made in health (*i.e.*, to which operation is given in health).

(2) Those made whilst suffering from a mortal malady.

(3) Those made with the object of taking effect after death.

"Transmutation of proprietary right is necessary in the first, but *not* in the third, for that is testamentary in its nature; but the second is like the first, though it takes effect with reference to the third of the estate of the *wâkif*, like a gift made in death-illness."

If a person suffering from a death-illness make a *wakf* of his house, it would be lawful and valid if it does not exceed one-third of his estate, but if it exceeds the one-third and the heirs consent, it would be valid in its entirety; but if the heirs do not consent, the *wakf* will be avoided as regards the excess over a third. If some of the heirs consent and the others do not, the *wakf* in excess of the one-third will be valid in proportion to the shares of the assenting heirs. If one of the non-assenting heirs sells his share in the portion of the property respecting which the *wakf* is disallowed, and subsequently it is discovered that the *wâkif* has left other properties besides, so that the *wakf* can be valid in its entirety with reference to the property dedicated, owing to its forming less than one-third of the entire estate of the *wâkif*, the sale by the heir will not be set aside, but he will have to pay the price thereof for the purchase of other property to be added to the *wakf*.

It has been already stated that a *wakf* is irrevocable. Once the dedication is made by word or in writing, the proprietary right of the dedicator becomes extinguished for ever, and he cannot any more deal with the property in any shape.[1] The mere declaration by the owner that he dedicates the property or has already dedicated is enough to divest his proprietary right therein. Thenceforth it is absolutely inalienable and unheritable.[2] *But a wakf made by a person to take effect after his death, or what is called a wakf by way of wasiut (wakf-bil-wasiut) is revocable at any time before his death.* "And like all testamentary dispositions," says the *Fath-ul-Kadîr*, "a *wakf* declared to come into operation after the death of the *wâkif* may be revoked by him at any time before his death ; but if not revoked, it will be operative in respect of a third of the estate unless assented to by the heirs, when it will take effect in its entirety." Testamentary *wakf* revocable.

This principle is stated in the clearest terms in the *Ghâit-ul-Bayân*. According to the Disciples "a *wakf* may be made in health or in sickness."..."If the person making it is suffering from an illness, of which he dies, it will take effect in respect of one-third of his estate like a testamentary *wakf*."

SECTION III.

Sadakah—ITS MEANING.

THE word *sadakah* occurs so frequently in works dealing with Mahommedan Law, that it is desirable to explain its meaning before dealing with the subject of the constitution of a *wakf*. Richardson translates it as meaning an alms-gift and also as property dedicated to pious uses. Hamilton evidently thought that the word meant 'alms' to the poor ; and this error has affected all subsequent conceptions.

As a matter of fact, the word *sadakah* has a much larger meaning in the Mahommedan system. It means, properly speaking, a pious act :—a smile in a neighbour's face is *sadakah ;* to help the weary is *sadakah*. Probably, the only word by which it can be construed is the word *charity*, as explained by St. Paul.

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[1] *Ghâit-ul-Bayân*; *Fath ul-Kadîr*, Vol. II, p. 638

[2] For other authorities, see *post*

In Mahommedan Law, however, it means an offering or gift made with the object of obtaining the approval of the Almighty, or a reward in the next world. For example, a present to a friend is not a *sadakah* because there is no pious intention. But if a gift be made with the object of relieving his wants or to provide against his falling into indigence, it is a *sadakah*. A donation, therefore, with the object of obtaining the reward or approbation of the Almighty is a *sadakah*. If the purpose itself is pious, whether the gift is made primarily with the intention of obtaining the Almighty's reward or not, still it is *sadakah*, for the Almighty will bless the act whether the person doing it did it with that motive or not. For example, making provision for one's self or for one's children against future want, is a pious act. If one makes such a provision the Almighty will bestow His reward even if the person did not think at the time of such reward. As a matter of fact, among Mussulmans no dedication is created, or offerings made, without the intention (*niat*) being formulated in the mind, "I do this the with the object of approaching the Almighty."

The meaning will be clear from the following examples :—

"To give to one's child or wife is a *sadakah* according to the Prophet's precept reported by Saad ibn Abî Wakkâs."[1]

" It is reported by Saad bin Aaffir who received the *hadîs* from al-Lais, who again received it from Abdur-Rahmân bin Khalid bin Musâfar, who again received it from Shahâb, who received it from Ibn al-Musâib from Abû Huraira, that the Prophet of God (may the blessings, &c.), declared that the best of pious offerings is a provision for one's self, so that he may not fall into need, and the [giving of] *sadakah* should commence with those whose subsistence is obligatory on you." [2]

"The Prophet of God has declared that a pious offering to one's family [to provide against their getting into want] is more pious than giving alms to beggars."[3]

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[1] Bokhâri p. 806. I have omitted the authorities, both here and in Muslim, tracing the Ordinances to the Prophet About Bokhari's authority, see Morley's Dig., Introd, p cclii.

[2] *Ibid.*

[3] *Nisai*, Chapter on *Sadakah* on one's relations, p. 413.

"Said the Prophet of God, when a Moslem bestows on his family and kindred, with the object of earning the approval of the Almighty, it is *sadakah*, although he has not given to the poor, but to his family and children" . . . .

"The most excellent of *sadakah* is that which a man bestows upon his family" . . .

"The greatest *sadakah* in point of reward is that which you give to your family."

"To give money to free a slave, to give alms to the poor, to give to your children and kindred, are all *sadakah*."

"Giving alms to the poor has the reward of one alms; but that given to kindred has two rewards."[1]

"The piety of all acts depends upon a pious motive, *viz.*, a desire to obtain the Almighty's reward . . . . A man who provides the means of subsistence with a pious motive for his family, is giving charity, and the Prophet of God has declared that it is a holy act."[2]

"And the Prophet has declared, that a man giving subsistence to his family is giving *sadakah*."

"And the Prophet of God declared that whatever subsistence you give to another will meet with God's approbation and reward from the Almighty; a provision for your wives will be rewarded."

"In giving charity, commence with those whose maintenance is obligatory on you."

"Support of one's self and his children and family is the first duty and necessity."

"The Prophet of God declared, in giving charity begin with those who are bound to you and of whom you are in charge."

"Zainab, the wife of Ibn Masûd, came one day and asked the Prophet, who were the best entitled to receive her charity. The Prophet of God declared 'thy husband and thy children are most entitled to receive thy charity.'

"Zainab, the daughter of Umm Sulma, says the Prophet directed her to support her relations, for that was charity, and God would give her His reward therefor."

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[1] *Mishkât-ul-Masabîh*, Vol. II, p. 421. [2] Bokhâri.

In the *Sahíh-i-Muslim*,[1] occur the following traditions recognized as authentic and binding throughout the Sunni world.

"The Prophet of God declared, that whatever a man spends, the most pious of expenditure is that with which he provides for the maintenance of his children and family and against their future want."

"The Prophet of God declared, that which you spend to provide for the maintenance of your family and against their future want, has greater reward than that which you spend to provide for the maintenance of others."

"The Prophet of God declared to one of the Faithful, 'in charity commence with yourself, and your family and your kindred, and if there is a balance give to those round about you.'"

"Abû Talha asked the Prophet upon whom or for what purpose should he dedicate a valuable property he possessed. The Prophet of God answered, 'consecrate it for thy kindred,' and he did so."

"The Prophet of God declared, that a Mussalman providing means of subsistence for his family is doing a pious act, and it is *sadakah*."

"A Moslem came and informed the Prophet that he had a *dinâr*, and asked what should he do with it? The Prophet answered, 'provide for thy wants with it.' He said he had another; the Prophet answered, 'provide for the needs of thy family therewith.' He said he had another. He was told to give it to the poor."

SECTION IV.

THE CONSTITUTION OF WAKF.

How a *wakf* may be constituted.

THERE is no essential formality or the use of any express phrase or term requisite for the constitution of a *wakf*. The law looks to the intention of the donor alone. Where a dedication is intended the law will give effect to it, in whatever language it may be expressed or in whatever terms the wish may be formulated. And a *wakf* may be made either verbally or in writing.

When the word *wakf*, or any of its synonyms in vogue, is used in making the consecration, the law fixes upon it all the legal incidents of a permanent and valid dedication. It is only when such

[1] A work of great authority see Morley's Dig., Introd., p. cclv

words are *not* used that reference is made to the intention of the donor. But when the intention to make a *wakf* is apparent or can be inferred from the general tenor of the deed or from the conduct of the donor or from the nature of the object in favour of which the grant is made [1] or from surrounding circumstances at large, it will constitute a valid and binding *wakf* though the word *wakf* might not have been used.[2]

In the *Fatâwa Kâzi Khân* this subject is dealt with thus :— "Some of the terms by which *wakf* may be constituted are the following :—

"As if a man were to say 'this my land is *sadakah*,' and add nothing more, the land would be dedicated as a charitable dedication for the poor." Here the word *wakf* is not used at all, but as *sadakah* means a pious offering, and the poor are always with us, it is sufficient to constitute a valid dedication.

"Or, if he were to say simply 'this land of mine is for a permanent object,' *wajjah abdi*, it would constitute a *wakf*." *Wajjah* implying a pious or charitable purpose, and *abdi* meaning permanency, the intention of the donor is sufficiently evidenced. And again, "where the purpose is designated, and it is declared or implied that it should take effect in perpetuity, it is sufficient to constitute a valid dedication."

"Or, if he were to say this 'land of mine is consecrated, and I have consecrated it' its effect is the same as if he had expressly said he had made it a *wakf*."

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[1] *Piran* v. *Abdul Karim*, I. L., 19 Cal., p. 203. In this case the dedication was made in these terms :—

وسواي موضع كنكرا كه مختص براے خرچ خانقاه منها كرده متعلق سجاده نشين گردانيديم *

"Excepting mouzah, &c., which having deducted I have made over to the *Sajjada-nashin* specifically for the expenses of the *Khankah*." It was held that these words constituted a valid *wakf*.

[2] The paraphrase by Mr. Niell Baillie of a chapter in the *Fatâwa Alamgiri* headed thus : "Words by which an appropriation is completed and those by which it is not completed," has given rise to an impression among English lawyers that there are set phrases or formulæ by which alone a *wakf* can be constituted, and if these expressions are not used, the *wakf* is not valid. It will be seen from the text that this idea is erroneous.

According to the *Sirâj-ul-Wahâj*, "when a person constitutes a *wakf generally*, without designating the object to which it should be applied, it is lawful—and this is correct."

And then it goes on to add that there are several words which are express in their meaning, and the use of which clearly constitutes a *wakf*, because they convey in themselves the intention to dedicate, for example, *wakafto*, *haramto*, *habasto*, *sabalto*, &c. "I have dedicated," "I have consecrated," "I have tied up," "I have given in the way (of God.") These terms are express in their signification, and when a dedication is made by such words it is complete, as the intention is apparent. But where any expression is used which does not ordinarily convey the meaning of permanent dedication, it must be seen what the intention of the donor is, which may be gathered from the nature of the object in favour of which the trust is created or from surrounding circumstances. For example, if a man says, "I give this property to this mosque," the fact that the grant is made to a mosque shows that it is for a permanent pious purpose, or if he were to say, "I give this property to the poor," the same result would follow. This rule is given in almost similar terms in the *Fath-ul-Kadîr*[1] :—"If a man were to say, 'I give this land to the poor,' it will constitute a valid *wakf*, for the poor are always existing, and hence the intention of the donor is clear that he means the income of the property should be applied permanently to the benefit of the indigent."

According to the *Wajiz-ul-Muhît*, "if a man were to say 'this my land is *moukoofa* (dedicated)' or '*muharrama*' (consecrated) or '*mahboosa*' (tied up), it will constitute a valid *wakf* according to Abû Yusuf, and *this is most correct*, for he (the *wâkif*) has mentioned *wakf* unrestrictedly, and an unrestricted *wakf* is for the poor by custom and practice, and what is customary is as if conditioned, &c."

لو قال ارضي هذه موقوفة او محبوسة او محرمة عند ابي يوسف
رح تصير وقفًا وهو الاصح لانه ذكر الوقف مطلقًا والوقف المطلق
يكون على الفقراء عرفًا وعادةً والمعروف كالمشروط

[1] A work of great authority in India, frequently quoted in the *Fatâwa Alamgiri* and by the Law Officers in the case reported in 1 Sel. Rep., p. 17, also in Fulton's Reports, p 345; See Morley's Dig., Introd., p cclxix.

According to the *Fatâwa Alamgiri* "if a person were to say, 'I have made this my land consecrated,' or 'it is consecrated' it would create a valid *wakf*, according to Abû Yusuf, says the Jurist Abû Jaafar,[1] as if he had said *wakf*," (for the word "consecrated," *muharrama*, which may also mean "forbidden to others," carries with it the signification that the property is set apart for a charitable purpose).

And add the Compilers of the *Fatâwa Alamgiri*, "and the Jurist Abû Jaafar says that 'detained and given as a *sadakah*' is equivalent to saying 'given as a *sadakah* and made *wakf*.'" And further—"if a person were to say 'this my land is a way, *sabîl*' and he is in a place where such expressions are commonly known to imply *wakf*, the land would become *wakf*. If the expressions are not known to have that meaning, he shall be called on to explain; and if he say that he meant *wakf*, they are to be applied according to his intention. If he say that he meant *sadakah*, or had no particular meaning, they are to be taken as a vow, and the land or its price should be given away as a pious gift."[2] * * * * * * *

In case of ambiguity, therefore, if the *wâkif* be alive, he would be the person to explain his meaning, but if he be dead, his intention is to be gathered from the surrounding circumstances, and the evidence of the manner in which the proceeds of the property have been applied.[3] If a man were to say simply, 'Buy out of the produce of this my mansion every month ten dirhems worth of bread, and distribute it among the poor,' according to the *Alamgiri* this is sufficient to constitute a dedication of the house for that purpose.

According to the *Hâwi*,[4] "if a man were to say 'this land and this house of mine is in the nature of *sabîl*' and he is in a country where *sabîl*, implies a *wakf*, it will become an absolute *wakf*. *Sabîl*, however, is now universally recognised to mean *wakf*." *Sabîl* or *Sabîl-illâh* (way of God) is equivalent to the phrase, *Râh-i-Khudâ* (the path of God) in vogue in this country.

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[1] Often called Hindwâni, the Indian.

[2] *Alamgiri*, Vol. II, p. 461.

[3] Kâzi Khân, Vol. IV, p. 74.

[4] A work of great authority, frequently quoted in the *Fatâwa Alamgiri*, by Kâzi Jamâl-ud-din Ahmed bin Mohammed bin Nûh al-Kâbisi of Ghazni, died in A. H. 600.

A declaration to the effect, that 'I have given the produce of this land to the poor' or any other charitable object, or 'I have given this house to the poor,' coupled with words prohibiting alienation and devolution by inheritance would, by consensus, constitute a *wakf*.[1]

The same principle is reiterated in the *Radd-ul-Muhtâr*. "There are twenty-six expressions given by way of example in the *Bahr* [*ur-Râik*] by which *wakf* may be constituted; and many others are given in the *Fath-ul-Kadîr*," ..... "but no express word is necessary to constitute a *wakf* so long as it is clear that the intention of the donor is to devote the usufruct of the property permanently to a good object;" ... "*e.g.*, if a man were to say, 'give so much out of the income of this my house to buy bread with for the poor,' that is sufficient to create a *wakf*." "Similarly, if a man were to say 'I have set apart this property' or 'assigned it,' or 'deducted it from my other properties.'"

"In the thirteenth section of the *Jâmaa-ul-Fusulain*, it is stated that if a person were to say, 'this room or this house is for lighting such a mosque,' and add nothing further, it will constitute a valid *wakf*; for such a purpose is sufficient."[2]

Jeiwan Dass Sahoo v. *Shah Kubeer-ood-deen.*

The decision, therefore, of their Lordships in the Privy Council in the case of *Jeiwan Dass Sahoo* v. *Shah Kubeer-ood-deen*[3] only gave expression to what was laid down in the Mahommedan Law. In that case the grant or firman[4] by which the endowments were created contained no mention of the word *wakf*. On the contrary, the grant purported to be made as '*Inam Altamgha maddadmâsh*,' which primarily convey individual proprietary rights. And it was, accordingly, contended on behalf of the defendant that the properties which formed the subject of the grant did not constitute an inalienable *wakf*. Their Lordships in the Privy Council in dealing

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[1] *Alamgiri*, Vol. II, p 461; *Bahr-ur-Râik*; 2 Sel. Rep., p 110.

[2] *Surrat-ul-Futâwa*, p. 455; (Mss., Patna Anglo-Oriental Library.)

[3] 2 Moore's Ind. App, 398.

[4] The firman of Alamgir ran as follows:—

"As it has come to the knowledge of His Majesty that agreeably to a sunnud furnished by the Hukims, certain Mouzas situate in Sircar Behar have been appropriated for the purpose of meeting the charges of fakirs and students of the Madrissa and the *Khankah* and Musjid of Moolla Dervish Hossain, son of Mulla Gholam Ali, and the aforesaid individual is hopeful for the royal munificence and favour, His Majesty's royal commands are that in the event of the aforesaid mouzas being in the occupation and enjoyment of that individual, the whole of

with the case endorsed the views of the *Sudder Dewany Adawlut*[1] in the following terms :—

"After referring to this case and the opinions of the law officers, the *Sudder Dewany Adawlut* in the case of *Mussumut Qadira* v. *Shah Kubeer-ood-deen* (3 Mac. Dew. Ad. 407) appear to have determined that notwithstanding the use of the words "Inam" and "Altumgha" in the royal grants and the mention therein of the persons upon whose petition the grants were made, yet as these grants appeared clearly to have been made (as expressed in the petitions) for the purpose of maintaining a charitable institution, the persons named were not to be considered proprietors ; that the establishment (Khankah)[2] was the real donee and the persons named were only *Mutwallis* of the Khankah ; that a *Mutwalli* has no right to alienate, and that consequently the transfer by gift or otherwise by Shah Shums-oo-deen was illegal."

Mussumut Qadira v. Shah Kubeer-ood-deen.

"This decision," their Lordships continued, "is in accordance with the doctrine laid down in the *Hedâyah*, Book XV, of *wakf* or appropriation, Hamilton's Translation, Vol. II, page 334, where it is said, *wakf* in its primitive sense means 'detention ;' in the language of the law (according to Hanîfa,) it signifies the appropriation of any particular thing in such a way that the appropriator's right in it shall continue, and the advantage of it go to some charitable purpose in the manner of a loan. According to the two disciples, '*wakf*' signifies the appropriation of a particular article in such a manner as subjects it to the rules of divine property, whence

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these mouzahs shall continue as they formerly were at jumma of 15,000 dams from (such a date) in the character of a *maddadmash* (aid for subsistence,) according to the tenor of the grant, and in order that he may apply the produce of these lands to meet the charges of the students of his Madrissa and Musjid; and the present and future Hakims, the Amils, &c., are enjoined to relinquish the mouzas in question to that person's occupation, to deem them *maaf* (exempt from taxes) and blotted with the pen in every respect, and not to require of him a fresh sunnud annually. Should that individual occupy anything in any other way they are not to countenance him."

[1] *Musst. Qadira* v. *Shah Kubeer-ood-deen*, Sel. Rep. III, p. 407.

[2] A *Khankah* is a religious monastery, a place where religious services are held, *dervishes* lodged, indigent travellers fed. It will be seen that the original grantee was a *mulla* or priest, and the grant was apparently made to him not only for his support and the support of his descendants, but also with the object of maintaining in perpetuity an institution for the lodgment of religious devotees, travellers and mendicants.

the appropriator's right in it is extinguished, and it becomes a property of God by the advantage of it resulting to his creatures. The two disciples, therefore, hold appropriation to be absolute, though differing in this, that Abû Yusuf holds appropriation to be absolute from the moment of its execution, whereas Mohammed holds it to be absolute only on the delivery of it to a *Mutwalli*, (or procurator,) and consequently that it cannot be disposed of by a gift or sale. Thus the term *wakf* in its literal sense comprehends all that is mentioned both by Hanîfa and by the two disciples."

"Again," (page 344) it is said, "upon an appropriation becoming valid or absolute, the sale or transfer of the thing appropriated is unlawful according to all lawyers; the transfer is unlawful because of a saying of the Prophet, 'Bestow the actual land itself in charity in such a manner that it shall no longer be saleable or inheritable.'" And their Lordships accordingly held, that "according to the Mahommedan Law, it is not necessary in order to constitute a *wakf* endowment to religious and charitable uses that the term *wakf* be used in the grant, if from the general nature of the grant such tenure can be inferred."

The word *wakf* sufficient by itself.

The word *wakf* used by itself is sufficient in every case to constitute a valid permanent dedication, for that is its express meaning in law. So that, as already stated, either where no object is designated, or where an object is mentioned, which is liable to failure, the *wakf* will, nevertheless, be valid and binding, and the property dedicated will, in the first case, be applied 'to the poor,' and in the second case will be applied to them on failure of the object named, though they (the poor) may not have been mentioned in the deed nor the word *sadakah* used at all.

The Compilers of the *Fâtâwa Alamgiri* say—

"Though no mention be made of *sadakah*, اذا لم يذكر الصدقة, yet if *wakf* is mentioned as by a person saying 'This my land is *wakf*,' or, 'I have made this my land *wakf*,' the land would be a *wakf* for the poor according to Abû Yusuf. . . ." "And Sadr-ush-Shahîd and the jurists (*mashâikh*) of Balkh have declared that 'decrees are given on the opinion of Abû Yusuf; and *we*[1] decree according to it, *also from regard to custom*."[2]

[1] *i.e.*, the Jurists of India.

[2] This passage shows clearly that in India the rule laid down by Abû Yusuf is the law applicable to the Hanafi Sunnis; Vol. II, p. 460.

"And if he should say, 'it is appropriated to Almighty God for ever,' it would be lawful, though the word *sadakah* be not mentioned and would be a *wakf* for the poor. The word *wakf* alone or in combination with *habs*, establishes a *wakf* according to the approved opinion, which is that of Abû Yusuf."

So also in *Kâzi Khân*,[1] "if a man were to say, 'this my land is made *wakf*' (*moukoofa*), and give its boundaries, and say nothing more, this according to Abû Yusuf is a valid dedication for the poor—"

"Or, if he were to say, 'this land of mine is *wakf*,' the effect is the same."

"Or, if he were to say, 'this land of mine is *wakf*, for a pious object'

"If he says this land is '*moukoofa* for God in perpetuity,' it will create a valid *wakf*, though he may not have used the word '*sadakah*,' and it will be a *wakf* in favour of the poor: and should he even not have used the words 'in perpetuity,' it will still be a valid *wakf* and the produce will be applied to the benefit of the poor."

"Similarly, if the *wâkif* merely said 'this is *moukoofa* for the sake of God,' or '*moukoofa* for obtaining *sawâb* (reward) of God.'"

"So also if he say, 'this land of mine is *moukoofa* for the sake of charity or generosity (على وجه البر والخير)' or for both, it will be a valid *wakf* for the poor."

"If a man say, 'this land of mine is *wakf* for the purposes of *jehad* (religious fighting), or for supplying shrouds to the dead, or burying them, or digging graves, or for any act of charity or piety which may be perpetual,' it will form a valid *wakf* for that purpose."

"If a *wâkif* declare a particular property to be a *wakf* for travellers, it is lawful, for travellers never cease; and its benefits will be applied to those who are poor among them and not to the rich."

"Or, if he were to say that it is for the lame, decrepit or maimed, it would be valid, (for these people are never wanting in the world,) and it will be applied to the poor among them."

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[1] *Fatâwa Kâzi Khân*, see Vol. III, p. 73.

The *Radd-ul-Muhtâr* says "if a man were to say 'this land or this house of mine is for the poor,' or is a *wakf* for so-and-so *in the way of God*, or 'for a good purpose' it is sufficient." "And according to Abû Yusuf the word *moukoofa* (past participle of *wakf*) is sufficient, and Shahîd says 'we give *fatwas* universally according to this.'"

In India, in order to accentuate the fact of consecration, it has become usual to add the words "in the way of God" to the word "*wakf*," *e.g.*, to make the dedication in the following terms: "I make this *wakf* in the way of God for so-and-so."

"If a *specific* thing," says the *Tas-hîl* "be made *wakf* by the word *wakf*, it is valid, and upon the death of the *moukoof-alaih* its [produce] will go to the poor, and on this is the *fatwa*."

According to the *Wajîz-ul-Muhît*, "if a man were to say, 'this my land is *moukoofa*,' and do not use the words '*sadakah* in perpetuity' or 'on the poor,' it constitutes a valid *wakf* according to Abû Yusuf, and *this is correct*."[1]

According to the *Ghâit-ul-Bayân* also, "if the *wâkif* does not use the word *sadakah*, but simply uses the word *wakf*; for example, if he were to say, 'this land of mine is *moukoofa*,' or 'this land of mine is *wakf*,' or 'I have made this *moukoofa* or 'I have made this *wakf*,' this *wakf*, according to Abû Yusuf, will be for the poor alone. And the Mashâikhs of Balkh decide according to Abû Yusuf's enunciations."

لولم يذكر الصدقه و ذكر الوقف بان قال ارضي هذه موقوفة او قال ارضي هذه وقف او قال جعلت ارضي هذه موقوفه اوقال ارضي هذه وقفا فان هذا يكون على الفقراء في قول ابي يوسف رح خاصّة وكان مشايخ بلخ يفتون بقول ابي يوسف رح *

Similarly, the word *sadakah* conjoined to the word *wakf* or its derivatives (like *moukoofa*, i.e. dedicated) would constitute a valid and binding *wakf*. For example, if a man were to say, 'this my land is a *sadakah moukoofa*, detained and perpetual during my life and after my death,' or 'this my land is a *sadakah*, detained and perpetual during my life and after my death,' or if he should

[1] *Wajiz-ul-Muhît*, p. 351.

say 'a *sadakah* dedicated and perpetual,' it would be lawful, or if he should say, 'a *sadakah* dedicated or a *sadakah* detained,'[1] without saying 'perpetual,' the land would become a *wakf*, "according to all who consider *wakf* lawful, because a perpetual *sadakah* is established which does not admit of cancellation. The words 'This my land is a *sadakah* dedicated to what is good,' or 'to good purposes' also amount to a *wakf*."

Or, if a man were say, 'my land is *sadakah* (charity) for God,' or '*wakf* to Almighty God,' it would become *wakf*. So also if he were to say, 'my land is assigned in the *way* of Almighty God,' or 'to seek the reward of Almighty God;' or if he were to say, 'my land is *wakf* for a good purpose,' على وجه البر, it would be as lawful as if he had said a *sadakah wakf*."

"If he say 'this land of mine is *sadakah moukoofa* or *moukoofa sadakah*' and say nothing more, it will be a valid *wakf* (according to Abû Yusuf, Mohammed and Hillâl), and the benefit will go to the poor in perpetuity.'

"If a man say 'this land of mine is *sadakah moukoofa* for such a person,' it will be valid and the result will be that the ultimate beneficiaries will be the poor, for they are the lawful ultimate recipients of of every pious offering, but the produce will be given to the person mentioned during his lifetime."

"If a person were to say, 'this my land is *sadakah moukoofa* for such a person in perpetuity,' or that 'it is for my *walad* in perpetuity,' the same result will follow, the mention of the word 'in perpetuity' not making any difference."

"And if a man were to say, 'this my land is dedicated, consecrated and detained,' or, 'dedicated, detained, and consecrated not to be sold, inherited or given by gift,' all these words would create a *wakf* according to the received doctrine and the opinion of Abû Yusuf."[2]

Having regard to all these dicta on a point about which there is absolute *consensus* on the part of the jurists, one finds it difficult to understand where the idea was derived from which was expressed in the case of *Mahomed Hamidulla Khan* v. *Budr-* *Hamidulla Khan v. Budrunnissa Khatun.*

[1] *Muhboosatan* from *habasa*, means literally detained, its exact signification however, is "being rendered inalienable," *Moukoof* is the participle of *wakafa*.

[2] *Alamgiri* after the *Mahsût*.

unnissa Khatun[1] that a *wakf* in favour of one's children cannot be constituted without the use of the word *sadakah*.

In that case, the consecration was made in the following terms :—

"I have made *wakf* of the remaining 4 annas in favour of my daughter Budr-un-nissa and her descendants, and also her descendant's descendants how low soever, and when they no longer exist, then in favour of the poor and needy ; such *wakf* is good, legal, valid and effectual, and of the nature of a lasting permanent act of charitable endowment, the same being as good in my lifetime as after my demise, and the same being precluded from *tumulluk* and *tamlik*.[2] After payment of the Government Revenue and Collector's charges, &c., and after deduction of the Mutwalli's *towlint* right from the proceeds of all the above endowment properties, the surplus, whatever it may be, shall be divided as follows :—*i.e.*, 4 annas share be given to Jamila Khatun *alias* Dhone Bibee and 4 annas to Budr-un-nissa, inasmuch as 4 annas has been endowed in favour of the said ladies, &c."

So far as the constitution of the dedication went, nothing could be more distinct and explicit than the declarations contained in the above *wakfnamah ;* the grantor expressly excluded all rights of dominion over the property settled, which was intended to serve as a permanent provision for Budr-un-nissa and her descendants so long as there were any in existence ; and on their failure, he provided that the benefit of the *wakf* should accrue to the poor and indigent. It will be seen that the terms of the settlement were in strict conformity with the provisions of the Mahommedan Law.

Upon a suit by Mahomed Hamidulla Khan to set aside a sale of a portion of the dedicated property in execution of a decree, on the ground that it was *wakf*, and consequently inalienable, the High Court held (1) that to constitute a valid *wakf* there must be a dedication of the property *solely* to the worship of God or to religious or charitable purposes ; (2) that when a settlement under the Mahommedan Law is made in favour of a particular person and his descendants in perpetuity, and on their failure in favour of the

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[1] 8 Cal. L R, p. 164. In this case the learned Judges thought that the *Hedâya* had been written by Abû Hanîfa, who had died five centuries before the work was penned.

[2] *i.e.*, from being owned (as private property) or being transferred.

poor and needy, such settlement is only valid as a *wakf*, when the word *sadakah* is used in the deed of settlement.

As regards the first principle laid down by the High Court, I shall discuss it more fully in a later chapter.

As regards the second, *viz.*, the necessity for the use of the term *sadakah* where it is intended to create a trust for one's family or descendants, the question is set at rest by a reference to the express dictum of the law.[1]

SECTION V.

CONDITIONS RELATING TO THE CONSTITUTION OF A WAKF.

Declaration extinguishes the right of the *wâkif* in the property.

As already stated, no formality is required to be gone through for the purpose of creating a valid *wakf*. It is enough if the donor declares that he constitutes a property *wakf* or has constituted it a *wakf*. That declaration fixes upon the property purported to be dedicated all the character of a legal and binding *wakf*, extinguishes the title of the donor, vesting it in the Almighty (whatever the object to which it is dedicated), and makes it irrevocably inalienable and non-inheritable. In the *Sirâj-ul-Wahâj*,[2] it is laid down as follows :—"Abû Yusuf has declared that *wakf* is valid whether the property be *Mushâa* (a share of a joint property) or whether it be consigned or not, whether [perpetuity] be mentioned or not, and the right of the donor becomes extinguished by his merely stating that he has made it *wakf* or makes it *wakf*, for *wakf* is on the same footing *as emancipation, and on this is the Fatwa.*"

فقال ابو يوسف يجوز مشاعاً كان او مقسوماً سلّمه الى المتولّى او لم يُسلّمه اشترط او لم يشترط و يزول الملك بمجرد القول لانه بمنزلة الاعتاق و عليه الفتوى *

And in the *Ghâit-ul-Bayân* the same principle is given in the following words :—"The right of property is extinguished according to Abû Yusuf by the mere declaration, that is, according to him, by merely saying 'I have made this

[1] See *post*.

[2] A work of great authority in India; quoted by the Law Officers in the case in Fulton's Rep., p. 345; also 1 Sel. Rep., 17, &c.

wakf' the right of property [in the donor] becomes extinguished."

قوله تزول بالقول عند ابي يوسف رح اى يزول الملك عن الوقف بمجرد قوله وقفت عندهٔ *

So also the *Fath-ul-Kadîr* :—"According to Abû Yusuf the *wakf* becomes complete by mere declaration, and if no object is mentioned it becomes a *wakf* for the poor . . . . and when the *wakf* has become valid for the poor by implication, no further mention of perpetuity is needed, for that purpose never fails, and Sadr-ush-Shahîd says that all the jurists decide according to Abû Yusuf, and *we also decide according to him*."[1]

Perpetuity a necessary condition, but its mention not necessary

Perpetuity is a necessary condition to the constitution of a valid *wakf*, but it is not necessary that it should be expressly mentioned. In other words, the intention must be, either by implication or by express declaration, to dedicate the property permanently, but it is not necessary that the dedication should be primarily or expressly for a continuing object. If a dedication is made with the term *wakf*, *habs*, &c., the intention to part with the property permanently is apparent upon the face of the declaration of *wakf*, and, whatever be the object named, the law will apply it on failure of the objects designated to other unfailing objects. If a *wakf* is not made in such express terms, the nature of the object must be taken into consideration and the intention gathered from circumstances.

The *Radd-ul-Muhtâr* is very explicit on this point. "Abû Yusuf holds the declaration of *wakf* to be like a declaration respecting the emancipation of a slave. Accordingly, he does not consider delivery or separation necessary. According to him the *wakf* becomes binding and operative on mere declaration بمجرد القول like the declaration for emancipation, for extinguishment of right of property, is common to both . . . . It is stated in the *Durrar* [*ul-Ahkâm*] it is correct that perpetuity is a condition by consensus, but according to Abû Yusuf its mention is not necessary" . . . . "and if a man says 'I make this dedication on my children' and add nothing further, *it is valid*."

"Some have said that the mention of perpetuity is required in such a case by most jurists excepting Abû Yusuf; [but] according to

[1] *Fath-ul-Kadîr*, Vol. II, p 632.

him the mention of the word *wakf* or *sadakah* implies perpetuity, and consequently it is stated in the 'Book' [*Mukhtasar-ul-Kudûri*] that such a *wakf* is valid, and after the failure of the children it will be for the poor though they are not named, and *this is correct*."

قوله وجعله ابو يوسف كالاعتاق ... فلذلك لم يشترط القبض والافراز الخ اي فيلزم عنده بمجرد القول كالاعتاق بجامع اسقاط الملك قال في الدرر والصحيح ان التابيد شرط اتفاقا لكن ذكره ليس بشرط عند ابي يوسف لو قال وقفت على اولادي ولم يزد جاز الوقف الى قوله وقبل ان التابيد شرط بالاجماع الا ان عند ابي يوسف لا يشترط ذكره لان لفظ الوقف والصدقة مبنى عنه ولهذا قال في الكتاب وصار بعدها للفقراء وان لم يسمهم وهذا هو الصحيح

So also the *Ghâit-ul-Bayân*. "Abû Yusuf has said that *wakf* is valid whether it is *mushâa* or partitioned, delivered to the *mutwalli* or not, and whether he has mentioned perpetuity or not...and Abû Yusuf bases his view on the rule laid down by the Prophet, who only declared to Omar to tie up the property and apply its usufruct to human benefit, and did not make delivery or mention of perpetuity or division a condition for the validity of the *wakf*."

قال ابو يوسف رح يجوز مشاعاً كان او مقسوماً سلمه الى المتولى او لم يسلمه شرط التابيد او لم يشترط - الى قوله ورجه قول ابي يوسف رح ان النبي صلى الله عليه وسلم امر عمر رض بالوقف ولم يامره بالتسليم فعلم ان التسليم ليس بشرط

"Perpetuity," says the *Fatâwa Alamgiri*, "is also among the conditions of *wakf* according to all opinions, though according to Abû Yusuf the mention of it is not a condition, and *this is correct*.[1] A man dedicates his mansion for a day, a month or any specified time without further addition, the *wakf* is valid and perpetual. But if he should say, 'This my land is a *sadakah moukoofa* for a month and when the month has expired the *wakf*, would be void,' the *wakf* would be void immediately according to Hillâl, because perpetuity being a condition, limitation to a parti-

Perpetuity necessary condition of *wakf*.

[1] After the *Kâfi*, *Alamgiri*, Vol. II, p 459.

cular time is not lawful.[1] If one should say, 'This my land is a *sadakah moukoofa* after my death for a year,' without further addition, the *wakf* would be lawful in perpetuity for the benefit of the poor, for the words have the meaning of a bequest.[2] And if one should say, 'This my land is a *sadakah* dedicated to such an one after my death for a year, and when the year has expired the *wakf* is void,' it would be a bequest after his death to the person referred to for a year, and then it would become a legacy to the poor and its produce would be distributed among them. But if he should say, 'My land is dedicated to such an one for a year after my death,' without further addition, the produce would be to him for a year and then it would revert to the heirs."[3]

The *Tas-hîl* is to the same effect:—"it (*viz.*, the subject of the *wakf*) can neither be sold nor given by gift nor inherited; only its produce is to be spent; and it will come out of [or be excluded from] the property of the *wâkif*, according to Abû Yusuf, by the mere declaration, for *wakf* means the extinguishment of the right of property of the *wâkif*, and it is not *tamlik* [transfer of property;] it is therefore lawful without delivery, like emancipation. And the Jurists of Irâk decide accordingly..... Abû Yusuf has held a *wakf* to be valid without mention of perpetuity, so that when a person has made a *wakf* on some object that is liable to failure, according to Abû Yusuf, it will be lawful, and after failure of that object, it will be for the poor, and will not become the property of his heirs, and *this is correct*."

لا يباع ولا يوهب ولا يورث ولكن لتنفق ثمرته الى قوله فيخرج عند ابو يوسف رح بمجرد القول لان الوقف اسقاط ملك الواقف لا تمليك فصح بدون التسليم كالاعتاق و به يُفْتي مشائخ العراق الى قوله يجيز ابو يوسف رح بلا ذكر تابيد حتى لو وقف على جهة يتوقّف انقطاعها يصحّ عنده و يكون بعدها للفقراء لا ملكاً للورثة في الصحيح *

[1] After Kâzi Khân, Vol. IV, p. 83 (Mss. Copy belonging to the Asiatic Society.)

[2] After the *Muhît-i-Sarakhsi*.

[3] After Kâzi Khân. The distinction between the two cases arises from the use of the word *sadakah* in one and not in the other, *Fatâwa Alamgiri*, Vol. II, p. 459

And the *Ramz-ul-Hakâik*, after stating the origin of *wakfs*, adds "Besides the incidents of a *wakf* are that it cannot be sold nor can it be given by gift, nor can it be inherited, and [if no other object is specified], its produce will be spent on the poor, and relatives and travellers, and the *wâkif* may also eat thereof... And according to Abû Yusuf, merely saying that 'I have made this property *wakf* is sufficient to extinguish the proprietary right of the *wâkif*, for by that the property is assigned over to God like the emancipation of a slave; and in this view the other three Imâms agree, *viz*, Shâfeï, Mâlik and Hanbal..." "And says Abû Yusuf, 'that even if an object is mentioned that it is likely to fail, still the *wakf* will be valid, and after the extinction of the object named, the produce will be applied to the poor, even if the poor are not mentioned.'" *Wakf* takes effect upon declaration.

Abû Yusuf has laid down that a *wakf* takes effect, or comes into operation, immediately on the declaration of the person making the dedication, that he has constituted a particular property *wakf* or constitutes it *wakf*— "just like emancipation." *Wakf* is like emancipation.

The meaning of this rule has, it appears to me, escaped the attention of the Law Courts in this country. The principle, however, is really this: when a person emancipates a slave, he cannot make any revocation, nor can he afterwards say that he had no intention to emancipate at all or to emancipate absolutely. The moment he pronounces the words or declares that, "I emancipate this slave," the law fixes the status of freedom upon the slave. Once the words are pronounced, neither the emancipator, nor his heirs, creditors, or assignees can question the absoluteness of the emancipation. No question of intention arises; for the law presumes an absolute and unqualified intention from the declaration.

According to the principle laid down by Abû Yusuf, the declaration of *wakf* stands on the same footing as a declaration of emancipation, and it takes effect absolutely the moment the declaration is made.

Once a particular property is dedicated, the right of the *wâkif* is extinguished for ever. He cannot turn round and say afterwards that he had no intention of creating a *valid wakf*; nor can his heirs, or creditors, or other persons deriving title for him say that it was a 'pretended' *wakf*; that at the time of making the dedication he had no intention of making a 'real' *wakf*.

Absolute and irrevocable.

If the *wakf* is in favour of an object recognised as lawful by the Mahommedan Law and religion, the *wakf* is irrevocable, absolute, and beyond question. This is emphatically the Mussulman Law according to all the sects and schools.

Perpetuity not necessary to be mentioned.

"The correct principle is that mention of perpetuity is not a necessary condition.". . . According to Abû Yusuf "if a dedication is made in favour of specific individuals, it is lawful, and upon their decease, the income would be applied for the benefit of the poor."

In India, this rule is binding, as laid down in the *Alamgiri*, for the Indian Jurists have followed the Jurists of Balkh who are in accord (according to the *Wajiz-ul-Muhît*) with those "of Khorasan and Irâk," in other words, with the other Hanafi jurists all over the world, excepting the Bokhariots. According to the *Wajiz-ul-Muhît* also, "the mention of perpetuity" or of "a permanent object" is not necessary, for "if a man were to say 'this my land is *wakf* or *sadakah wakf* for some specific individual or for some specific object or for certain of his poor relatives or for certain orphans, though he may not mention perpetuity, still, according to Abû Yusuf, it will constitute a legal *wakf*."

"Or, if the *wâkif* were to say, 'this my land is *moukoofa* for so-and-so, or for my child,' the *wakf* is valid, though the word *abad* (perpetuity) is not mentioned, according to Abû Yusuf, and so long as the specific individual is alive, the income of the property would be applied for his benefit, and after his death it will be spent on the poor."

وان قال ارضي هذه موقوفة على فلان او على ولدي جاز الوقف
وان لم يذكر عند ابي يوسف والغلّة لفلان ما دام حياً فاذا مات
تصرف الغلة الى الفقراء *

But, if instead of "*moukoofa*" simply, he were to say *sadakah moukoofa*, it would be valid according to Abû Yusuf as well as Mohammed, though perpetuity (*i.e.*, a perpetual object) had not been mentioned.

So also in the *Jouharat-un-Nayirèh*, "Abû Yusuf has declared that even where an object has been named, which is liable to fail, the *wakf* is valid, and after the failure of that object, it will be for the poor though they may not have been named,...*and this is correct.*'

وقال ابو يوسف رح اذا سمى جهة تنقطع جازت وصارت بعدها
للفقراء وان لم يسمهم وهذا هو الصحيح

According to Abû Yusuf, like the term *wakf*, the term *sadakah* implies perpetuity and the two are convertible, and he therefore holds that though the poor may not be mentioned, the profits will go to them on failure of other objects. The mention of *sadakah* is to mention perpetuity.

In short, any term which implies perpetuity would be sufficient to create a *wakf*. For example, the mention of the poor, or *sadakah-moukoofa* for God, *moukoofa* for benevolence (*ihsân*,) or charity (*khair*,) or for *jehâd* (holy warfare,) shrouds, cemeteries, &c., is sufficient. When a *wakf* is created for a specific individual or class of individuals by any term which, like *wakf* or *sadakah*, implies dedication of the *corpus*, or shows that the property has been permanently parted with, it is valid and binding according to Abû Yusuf, and upon their extinction the produce will be applied to the poor, for the ultimate recipients of all *wakfs* are the poor, and they never fail—"and Sadr-ush-Shahîd has stated [that the *Fatwa* is thereon] and the Jurists of Balkh give *Futwas* according to this opinion, and *we* [*also*] *decide according to that view.*"[1]

Fatâwa Kâzi Khân.

According to Kâzi Khân, explicit declaration that a *wakf* is created is sufficient to constitute a *wakf*. When a *sadakah-moukoofa* is made for a limited period without any mention that on the expiration of that period, the subject-matter of the *wakf* should revert to the appropriator, it would take effect as a *wakf* in perpetuity, for, according to custom, the term *wakf* implies and includes the poor, and that amounts to an actual dedication. But where a condition is made that it should revert to the donor, the condition is *bâtil* or void according to Abû Yusuf.[2] The *Radd-ul-Muhtâr* adds—

"The ultimate object of a *wakf* must according to all be for an object which never fails. According to Abû Yusuf such an object need not be mentioned, for when a *wâkif* makes a dedication for a *specific* object and does not mention to what purpose of a permanent character it should be applied on failure of the initial trust, the property would go to the poor, as they are the ultimate recipients of all *wakfs* when no other purpose is specified, and the univer-

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[1] *Fatâwa Alumgiri*, Vol. II, p. 460.

[2] Hillâl holds that it will hold good for the period specified. This is in accordance with the Shiah doctrine.

sality of jurists have adopted this view and the *Fatwa* is thereon . . . and in the *Durrar* it is stated this is correct . . ."

And again, "if a *wakf* is made for a specific object (*e.g.*, one's descendants) and nothing further is mentioned, it is valid according to Abû Yusuf, and after the extinction of that object it will go to the poor — and this opinion is followed by the Sahib-ul-Hedâya, *Muntaka*, *Nihâya*, &c." . . . and in the *Sadr-us-Shâraya* it is stated that the *Fatwa* is thereon."[1]

To sum up the result of the authorities :—according to all the jurists "perpetuity is a necessary condition," but according to the acknowledged and accepted view, "on which the *Fatwa* is," *viz.*, the rule laid down by Abû Yusuf, it is not necessary to mention it at the time of dedication; in other words, though all the jurists insist that the property should be dedicated permanently and the right of the donor therein parted with for ever, according to Abû Yusuf it is not necessary that the word *tâbid* or *abad* should be mentioned, or that the object in favour of which the dedication is primarily made should be of a continuing and permanent character—for

قال ابو يوسف رح اذا سمى جهة تنقطع جاز وصار بعدها للفقراء وان لم يسمهم

"Abû Yusuf has said that when he [*the wâkif*] has named a purpose liable to failure it is valid, and after its failure, it will be for the poor, though they are not named."

And

يجيزه ابو يوسف رح بلا ذكر تابيد حتى لو وقف على جهة يتوقف انقطاعها يصح عنده ويكون بعدها للفقراء لا ملكا للورثة فى الصحيح *

"Abû Yusuf holds a *wakf* to be valid without mention of perpetuity, so that when a *wakf* is made in favour of an object liable to failure it is lawful according to him, and after the failure of the object it will go to the poor and not become the property of his heirs, and *this is correct*."[2] For, there are many objects that are liable to failure which are as pious in their nature as objects that are continuing. This is the real meaning of the following passage in the *Ghâit-ul-Bayân*, :—

[1] *Radd-ul-Muhtâr*, Vol. III, p. 565.

[2] *Ghâit-ul-Bayân*.

قوله و هو موفر عليه اي التقريب الى الله تعالى موفرٌ على جعل الوقف بجهة ينقطع كما هو موفرٌ على جعله بجهة لا ينقطع يعني يصل التقريب بهذا الوجه الى قوله كما يصل بذلك الوجه *

But when a *wakf* is made in favour of "a specific object liable to failure," and any term is used in the dedication as signifies that it is permanent in its character, *e.g.*, *sadakah* or *fi-sabîl-illâh* ("in the way of God,") the *wakf* is valid not only according to Abû Yusuf, but also according to Mohammed, who considers the mention of perpetuity, or the mention of some object of a perpetual character necessary. The *Radd-ul-Muhtâr* quoting the *Fatâwa Kâzi Khân* (cited as *Khânieh*) says :—and "if a man were to say that a property was dedicated as a pious offering (*moukoofa-sadakah*), and add nothing further, it is lawful according to Abû Yusuf as well as Mohammed and Hillâl . . . . and when an object has been specified, it is lawful according Abû Yusuf, and after its extinction it will go to the poor, and the *Hedâya* has held this *to be correct*, and the texts are thereon, as in *Kudûri*, *Multaka* and *Nikâya*, &c."

و لو قال موقوفة صدقة او صدقة موقوفة و لم يزد جاز عند ابي يوسف و محمد و هلال ..... والصحيح الجواز لان محل الصدقة في الاصل الفقراء فلا يحتاج الى ذكرهم ولا انقطاع لهم فلا يحتاج الى ذكر الابد ايضا الخ فهذا صريح في ان التصريح بالصدقة تصريح بالتابيد فيجوز عند هما بلا خلاف ..... فلو عين جاز عند أبي يوسف ثم بعد انقطاعه يعود الى الفقراء كما صححه في الهداية و عليه المتون كالقدوري و الملتقى و النقاية و غيرها *

The *Sirâj-ul-Wahâj*, states that, "Abû Yusuf says if a person make a dedication in favour of an object liable to failure, it is valid, and after its extinction, the *wakf* will be for the poor, though they may not be named *e.g.*, if one were to say 'I have constituted this, *sadakatan moukoofatan l'illah-taâla ubdan* (*waky as a pious offering for God in perpetuity*) on the child of so-and-so and his child's child,' and do not mention the poor or indigent, for when he has consecrated it to God, it is in perpetuity, as to what is dedicated to God is spent on the poor ; thus his saying as above is as if he had mentioned them."

قال ابو يوسف اذا سمى جهة تنقطع جاز وصار بعدها للفقراء
و ان لم يسمهم و ذلك مثل ان يقول جعلتها صدقة موقوفة لله
تعالى ابدًا على ولد فلان وولد ولده ولا يذكر الفقراء ولا المساكين
و ذلك لانه اذا جعلها لله فقد ابدها لان ما يكون لله فهو
ينصرف الى المساكين فصار كما لو ذكرهم

Similarly, in the *Tus-hil*—"if a man were to say 'I make this property *moukoofa-sadakah* (a charitable *wakf*) for (*aala, on*) so-and-so, its produce will be for such person for his life and after his death it will be spent for the poor."

موقوفة صدقة على فلان و الغلة له ما دام حيًّا فاذا مات يصرف
الى الفقراء -

Upon the authorities it is perfectly clear that, under the Hanafi Law, "perpetuity," express or implied, is a necessary condition to the constitution of a *wakf*, but its mention is not necessary at the time of dedication. Nor, is it necessary that the dedication should be primarily for a *permanent* or *continuing* object. The term *wakf* and its equivalents imply perpetuity. And, accordingly, it has been laid down in the clearest terms that even when the *wakf* is, in the first instance, in favour of an object which is likely to fail, the *wakf* is not void on that ground, but the reversion would be applied for the benefit of the poor. If a *wakf* is created for a *limited* period, the limitation as to time is void, and the *wakf* takes effect as a perpetual dedication.

Delivery of possession not necessary.

In order that a *wakf* should become operative or binding, it is not necessary under the Hanafi Law that the property should be actually delivered by the *wâkif* to a trustee. Delivery of seisin is not necessary in *wakf* as it is in *Hiba*. The mere declaration of the *wâkif* is sufficient to constitute the property *wakf*, and the *wâkif* from that time forth is a mere trustee. He may be a trustee for himself, that is, he may reserve during his lifetime the income of the property for his own benefit; but whilst the law allows him, in case he makes a condition to that effect, to use the income of the property in whole or in part during his lifetime, the property is nevertheless a trust-property in his hands. He can neither sell it, nor mortgage it, nor burden it, nor deteriorate it in any way;

and if he does so, the reversioners would be entitled to have the property taken out of his hands and consigned to a *mutwalli*, to realize the rents and profits and to make over the balance to the *wâkif* after deducting expenses.[1]

"Though, according to Mohammed, consignment of the dedicated property and separation of it [from the other properties of the *wâkif*] are necessary to the completion of a *wakf*, according to Abû Yusuf, the *wakf* becomes absolute and binding, like emancipation, on the mere declaration of the *wâkif*, and his right therein becomes extinguished at once. And in the *Khulâsa* it is laid down that the jurists of Balkh decide according to the rule laid down by Abû Yusuf, and Sadr-ush-Shahîd has stated that the *Fatwa* is according to him ; and in the *Fath-ul-Kadîr* it is mentioned that Abû Yusuf's' opinion is the accepted doctrine ; and in the *Munia* it is stated that the *fatwa* is with Abû Yusuf, and this is the rule accepted by the jurists of Balkh. But the Bokhâriots have adopted Mohammed's opinion. And in the *Sharh-i-Vikâyah* and the commentary of Mulla Khusru [the *Durrar-ul-Ahkâm*] it is laid down that the *Fatwa* is with Abû Yusuf. In some places, in the *Khânièh* [*Fatâwa Kâzi Khân*[2]] it is mentioned that the *fatwa* is with Mohammed. . . . But in the *Muhît* it is laid down that the universality of our jurists have adopted the rule laid down by Abû Yusuf—and *this is correct*."[3]

The question whether, in order to constitute a valid *wakf*, it is necessary to make over possession to a *mutwalli* was considered at great length in the case of *Doe dem Jan Bibee* v. *Abdoollah Barber*, decided in the Supreme Court by Ryan, C. J. and Grant, J.

The Judgment of the Chief Justice is of great importance, and I therefore give it *in extenso*.

"It is not necessary to state the facts of this case as proved at the trial ; the whole matter in dispute between the parties being now narrowed to the construction that is to be put on this instrument of the 1st March, 1832. It is contended, on the part of the lessor of the plaintiff, that this instrument must be taken as a gift in contemplation of death, and that as such only one-third of the property can pass, and that the representatives of the plaintiff are

[1] *Fath-ul-Kadir*, Vol II, p 640.

[2] Kâzi Khân himself was a jurist of Bokhâra.

[3] *Surrat-ul-Futâwa*, p 430.

entitled to recover the remaining two-thirds in the present action. It is also stated that, as an endowment or appropriation to religious uses, it is defective in several particulars, which the Mahommedan Law requires to make such instruments valid and binding.

"First.—It is said that, according to Mahommedan Law, an appropriator for religious uses cannot reserve for his life to his own use part of the property so appropriated as the present instrument purports to do.

"Secondly.—That a delivery to a *Mutwalli* is essential to the validity of an appropriation; that in this case there was no such delivery, but the appropriator constituted herself the *Mutwalli* during her life.

"Thirdly.—It has also been objected that a female, who is in this instance the appropriator and *Mutwalli* during life, cannot, according to Mahommedan Law, act as *Mutwalli*.

For the defendant it is contended—

"First—That the instrument is *wakf* and not a testamentary paper;

"Secondly.—That the whole of the property passed under it, and that, according to Mahommedan Law, it is a valid endowment or appropriation of property to the service of God, and that consequently the verdict should remain as it now stands for the defendants.

"Upon the first question that has been raised, namely, whether this paper is to be considered as a *wakf* or consecration, or in the nature of testamentary paper, the Court entertains no doubt. The reason given by the Moulavies is the common sense view of the nature of the instrument. They say this paper is a deed of *wakf*,[1] or consecration, because, say they, the *wâkif* or consecrator herself writes 'she has consecrated certain lands in her lifetime,' and then states at the conclusion, 'These few words are, therefore, written by way of a voucher of a pious donation to serve as a binding and decisive document when occasion requires.' The Moulavies add, this would have been a Will if she had said that the *wakf* should take place after her death, or if she had made the *wakf* when labouring under the illness which terminated life.

"It is equally clear and without dispute that a female may act as *Mutwalli*. It is hardly necessary to cite authorities for this

[1] A translation of the deed of *wakf* in this case is given in the Appendix

position. The note in Mr. Macnaghten's book, p. 343, points out the distinction between the *Guddee Nasheen* (or superior of an endowment) and *Mutwalli*, and adds the office of trustee, *i.e.*, *Mutwalli*, may be held by a woman, and the duties may be discharged by proxy. In *Mussumant Hyatee Khanum* v. *Mussumant Koolsoom Khanum*[1] it is stated that it is legal for a female to be a trustee according to all the authorities of the law. (See also the *Fatâwa Alamgiri*).

"Upon the two remaining points which have been raised, namely, that the appropriator and *Mutwalli* are one and the same person; and secondly, that the appropriator has reserved part of the property so appropriated to her own use, for life, more doubt and difficulty exists. It will be seen from the *Hedâya* that in both these points opposite opinions have been entertained by great authorities. The work to which I refer is, I think, worthy of more respect than Mr. Advocate-General is willing to bestow upon it. I think Mr. Hamilton in his preliminary discourse shows the value of the book as a guide to Mahommedan Law, and which appears to have been compiled about the close of the 17th century. The work principally leans to the doctrine of Hanifa, or his principal disciples. Two of the most distinguished of those disciples were Abû Yusuf and Mohammed, and it is their differences of opinion in the book of the *Hedâya* to which I have already referred, that has given rise to the questions whether this instrument is a valid appropriation according to Mahommedan Law.

"Mohammed considers an appropriation with a reserve to the use of the appropriator during life illegal, and he also considers the assignment and delivery to the *Mutwalli* or procurator essential to the validity of an appropriation. Abû Yusuf, on both these points, is at variance with Mohammed. After obtaining all the information we are able to collect through the means of our Moulavies and a reference to authorities, we are of opinion that the opinion of Abû Yusuf on both these points must be considered as the law now prevailing and sanctioned by the more recent authorities.

"The translator of the *Hedâya* (who is some authority) seems to incline to Abû Yusuf's opinion by his note at page 351, and in the text, on the point whether an assignment and delivery to *Mutwalli*

[1] Sel Rep, I, p 285.

is essential to the validity of the gift, it is stated that Abû Yusuf's is the more generally received doctrine.

"But we have directed our Moulavies to give their opinions on these points and to cite their authorities, which authorities, whether in print or manuscript, we have directed our interpreter to translate. From the authorities they have cited, although they commence with stating the difference of opinion between the two learned disciples of Hanîfa, we think it clearly appears according to the modern doctrine of Mahommedan decisions and lawyers that Abû Yusuf's opinion on this point is considered the better law.

"Some of the authorities which they cite are in print, and one in particular, which supports the doctrine of Abû Yusuf, I need hardly say, is of great authority in Mahommedan Law, I mean the *Futâwa Alamgiri* which is a collection of opinions and precedents of Mahommedan Law compiled by Shaik Noyan and other learned men by command of the Mogul Emperor Aurungzebe. This compilation was made about, I presume, the close of the 17th century, and is of course received as an authority for the present state of the law.[1]"

"The following questions were referred to the Moulavies of the Court:—

1st Question.—Whether, according to Mahommedan Law, an endowment to charitable uses is valid, when qualified by a reservation of rents and profits to the donor himself during his life?

2nd Question.—Whether delivery of the property is essential to render an endowment valid, according to the rule which governs other gifts?

3rd Question.—Whether the endower can lawfully constitute himself Mootuwullee or trustee?

4th Question.—Whether a female can lawfully be Mootuwullee?

5th Question.—Whether the instrument in question is a will or a deed of endowment?

To these questions the following answers were delivered by the Moulavies of the Court and duly filed—

To the first question—

There is a difference of opinion between Abû Yusuf and Mahomed touching the *wakf* or consecration of lands with a reservation, and setting apart of any portion of the profits and produce thereof for the support of the *wâkif* or consecrator. Abû Yusuf considers the act legal, and Mahomed deems it illegal. The legal opinions of most of the learned uphold the opinion of Abû Yusuf, which is to be found in Chulpee or commentary of the Shurh Vekâyah' the Futawah Aulumgeeree, the Khazi Khan, and the Kaffee.

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[1] Grant, J., concurring, the rule obtained by the plaintiff was discharged.

To the second question—

Abû Yusuf does not consider the consignment and delivery of consecrated real property to the Mootuwullee as necessary to render the *wakf* or consecration legal. In this opinion Mahomed differs, but the practice is in accordance with the opinion of Abû Yusuf, as written in the Mooneeah, Futhul Kuddeer Serauj-ul-Wahauj, Hedayah and Veekyat-ul-Rawahef

To the third question—

It is lawful for the *wâkif* or consecrator to become Mootuwullee or Procurator, and to reserve the profits of part of the consecrated land for his own use and his descendants, as will be found in the Hedayah, the Khazi Khan, and the Aulumgeeree.

To the fourth question—

It is lawful for a female to act as Mootuwullee, and qualified to become, as is to be found in the Futawah Aulumgeeree and other Futawahs or text-books,

To the fifth question—

This paper is a deed of *wakf*, or consecration. From the tenor of this paper we are of opinion that it is an instrument of *wakf*, and not a testamentary paper, because the *wâkif* or consecrator herself writes that "she has consecrated certain lands in her lifetime," and that she states at the conclusion of the instrument thus:—"Therefore I have delivered these few lines in the nature of an instrument of *wakf*." This would then have been a Will if she had said that that the *wakf* should take effect upon her death, or if she had made the *wakf* with the illness that terminated her life,—in those cases this paper would have come under the guidance of the law touching Wills.

The following authorities were cited by the Moulavies on this occasion:—

In support of the first question.

From the Aulumgeeree in print, page 495, from line 10 to 12. "Whenever a *wakf* is made of land or other property and the party making the same reserves the whole of the profits thereof to himself, or a part only during his own life, and after that for the use of the poor, herein Abû Yusuf has said, "This *wakf* is right," and the learned of Bulluck (a town in Tooran) have decided conformably to this opinion of Abû Yusuf's and the decisions are in conformity therewith, for to induce persons to make *wakfs*. The like is to be found in the Sagrah and the Nesaub, and also in Moojmuraul—only.

From the Chulpee in print: the commentary of the Sharh Vekyah, page 245, from line 27 to line 28.

In the opinion of Abû Yusuf, it is right or lawful for the *wâkif* or consecrator to direct the profits to his own use and to make himself Mootuwullee, but not right in the opinion of Mahommed—only.

The Mooftee of Sakullian and Suddar Shaheed have said, the Futawahs or decrees are in conformity with the words of Abû Yusuf's—only.

From the Kaffee in Mss. sheet 568, from the 5th to part of the 6th line.

The *wâkif's* directing the profits of the *wakf* to his own use is right in the opinion of Abû Yusuf and the Musshâikh (Shaiks) of Bulluck, and the decrees are consonant with that—only.

From the Kâzi Khân in print, page 251, from line 2nd to part of line 5th

It is not right in the opinion of Heelall for the *wâkif* to stipulate in making a *wakf* that he shall appropriate the profits thereof to himself during his

life, but it is right in the opinion of Abû Yusuf and the Masshâikh of Bulluck have followed the opinion of Abû Yusuf, and said "such *wakf* and such reservation are both right," and Sudder Shuheed has said, the decrees are in conformity with the opinion of Abû Yusuf—only

In support of the second question,

From the Kâzi Khân, in print, page 212, from the 2nd to the 3rd line.

In the opinion of Abû Yusuf it is not necessary to deliver over possession to a Mootuwul'ee, therefore, the *wâkif* is entitled to become Mootuwullee, although he does not expressly reserve that to himself, and the Musshâik of Bulluck have followed this opinion of Abû Yusuf only.

From the Aulumgeeree in print, page 455, from line 13th to line 14th

The property of the *wâkif* in the *wakf* is severed from him by his saying "I have made a *wakf* thereof," according to the opinion of Abû Yusuf and the opinion of the three Emaums (leaders) Malick, Shafee, and Ahmud son of Haumbul, and the opinion of most of the learned, is in conformity with that and also with the Musshâik of Bulluck, and it is written in the Mooneeah "that the decrees are consonant with that," and the like is to be found in the Futah-ul-Kuddeer, which says that the decrees are agreeable to that opinion, and also in the Seerauj-ul-Wahauj—only

From the Veekahut-ul-rewahij in Mss., page 197, from the 7th to the 8th line

In the opinion delivered by Abû Yusuf, the right is severed on bare declaration—only

The authorities in support of the answer to the third question are to be found above.

The authorities in support of the fourth question are—

From the Aulumgeeree in print, page 504, line 15th.

In that respect men and women are equal

Those in support of the answer to the fifth question are—

From the Aulumgeeree, page 455, from the 6th to the 7th line

If a *wakf* is made to take effect upon the *wâkif's* death, saying, "upon my death I make a *wakf* of my house to so-and-so, and then the *wâkif* dies, the *wakf* is right as to one-third—only.

In the said book and page, from line 9th to line 10th.

"If the party appropriates the *wakf* to operate upon his death, during his illness, of which he eventually dies, the direction therein is that above—only."

The subject of the *wakf* must be certain.

The absence of uncertainty in the subject-matter of the *wakf* is also a condition,—not uncertainty in the object for which the dedication is made. Uncertainty in the object does not lead to the invalidation of the *wakf*, it only accelerates the application of the subject of the *wakf* to its ultimate object, *viz.*, the support of the poor, for they never fail.

But the *subject* of the *wakf* must not be uncertain.[1] Accordingly, if a person were to dedicate a portion of his land without

[1] *Alamgírí*, Vol. II, p 458; *Radd ul-Muhtâr*, Vol. III, p. 560.

specifying it, the *wakf* would not take effect unless it can be gathered from attendant circumstances what he intended to convey, when the *wakf* will be valid upon the basis of *istehsân*.[1]

The dedication must also not be dependent for its operation upon a contingency which may or may not occur. A condition, however, to which operation can be given immediately will not render a *wakf* void. Examples of the distinction between these two provisions of the law are given at great length in most of the law-books, and I would quote some passages here to render my meaning clear. Must not be dependent on a contingency.

For example, "'if a person were to say' says the *Alamgiri* quoting the *Fath-ul-Kadir*, 'If my son arrives, my house is a *wakf* for the poor,' and the son should arrive, nevertheless, the house does not become *wakf*.[2] Or if a person were to say, 'This my land is a *sadakah* if such an one please,' and the person referred to should indicate his pleasure, still the *wakf* would be void."[3] But when the condition is capable of immediate ascertainment or operation, the *wakf* would be valid. For example, "if a man were to say, 'if this house be my property it is appropriated as a pious offering,' the appropriation is valid if the house be actually his property at the time of speaking, for the suspension is here on a condition that is actually fulfilled, and there is no contingency."[4] Another instance is thus given :—"A man loses his property and says, 'If I find it, by God I will make a *wakf* of my land,' and he finds the property, it is incumbent on him to make a *wakf* of his land for the benefit of those to whom it is lawful for him to pay *zakât* or poor's rate, and if he should make it for those to whom it is not lawful for him to pay *zakât*, the *wakf* would not be valid nor would he be released from his vow."[5] And again :—"If a man were to say, 'if I die of this disease, I have made this my land *wakf*,' it is not valid whether he dies or recovers. But if he should say, 'if I die of this disease make this my land *wakf*,' it is lawful, for this amounts to the conditional appointment of a mandatory, which is legal."[6]

Example of a contingent *wakf*.

"But Shams-ul-Aimma Sarakhsi has stated at the end of his [chapter on] *Wakf*, that a *wakf* dependent on death is valid. And in the *Mukhtasar* [*-ul-Kudûri*] it is mentioned that where a *wakf*

[1] *Alamgiri*, Vol II, 466.
[2] So also in the *Surrat-ul-Fatâwa*.
[3] After the *Muhît*.
[4] Kâzi Khân, Vol. IV, p 84.
[5] *Sirajia*.
[6] *Jouharat-un-Nayerèh*

is made conditional upon the *wâkif's* decease, *e.g.*, if he were to say when I die this house will become *wakf* for this purpose, it will be valid.[1]

Whilst a man can validly make a dedication in his own favour, he cannot reserve to himself the power of selling the property dedicated and applying the proceeds to his own use.[2]

Where a *wakf* is made in favour of a lawful purpose and the *wâkif* reserves to himself the option of revoking the *wakf*, "the *wakf* is valid and the option void" by general consensus. According to Abû Yusuf, a short option, say, for three days, does not invalidate the *wakf*, if the option is not exercised within that time the *wakf* becomes absolute.

Section VI.

What may be Constituted as Wakf or the Subject-Matter of Wakf.

Everything which is capable of being possessed or of being reduced to possession may form the subject-matter of a *wakf*. In the *Mujtaba*, it is stated that according to Abû Yusuf, the *wakf* of such moveables as constitute the subject-matter of every-day transactions and dealings between people is valid. And Imâm Mohammed has laid down that the *wakf* of moveables is valid equally with the *wakf* of immoveable property, "and the *Fatwa* is according to his opinion." "Shâfeï and the other Imâms hold the same opinion."

"According to the great Doctor Shams-ul Aimma as-Sarakhsi," says Kâzi Khân, "*wakf* of moveables is valid; custom and usage, however, regulate what moveables can be made *wakf*. The *wakf* of shrouds, books, &c., are lawful according to all. The *wakf* of the milk of a cow is valid if customary. The *wakf* of *dirhems* (money) is valid. They would be applied in business and the profit arising therefrom would be used for the purposes of the *wakf*. In the same way, a measure of wheat may be dedicated."

"As owing to well-known evidence there is no divergence of opinion regarding the validity of a *wakf* of horses or implements of warfare, so according to the Disciples is valid the *wakf* of those moveables and chattels which are subsidiary of land, as implements

[1] *Surrat-ul-Fatâwa*, 435 · in fact this would be a testamentary *wakf*.

[2] *Alamgiri*, Vol. II, p. 459, after the *Nahr-ul-Fâik*.

of husbandry, cattle, &c. With reference to the lawfulness of a *wakf* of other kinds of moveable property, there is a conflict of opinion [between Abû Yusuf and Mohammed]. For according to Abû Yusuf, a *wakf* of every moveable is not valid ; whereas, according to Mohammed, all articles which form the subject of [human] dealing [or transactions] may lawfully be dedicated. And this view has been adopted by the jurists, of most countries as is mentioned in the *Hedâya ;* and *it is correct* as it is mentioned in the *Asaâf*. And it is the opinion of the majority of jurists as is mentioned in the *Zahîria*, for in human transactions analogy (*kyâs*) has often to be abandoned. And in the *Mujtaba*, it is mentioned, from the *Siyar*, that, according to Mohammed, the *wakf* of moveables is unrestrictedly valid, and according to Abû Yusuf, the *wakf* of those moveables as form the subject of business transactions is lawful. And all this is mentioned in the *Bahr-ur-Râik* and what has been stated is well-recognised. ... In the *Khulâsa*, this opinion is referred to Ansâri ; Ansâri was a disciple of Zuffer. And in Kâzi Khân, it is referred to Zuffer where he has said it is related from Zuffer on the authority of Sharnibilâlieh. And the author has stated in the [*Manah-ul-Ghuffâr*[1]] 'that in our time in the countries of Rûm [Turkey,] &c., it is customary to make *wakf* of *dirhems* and *dinars*, so the *wakf* of *dirhems* and *dinars*, comes within the dictum of Mohammed which is that every article which forms the subject of business transactions, a *wakf* thereof is lawful' and on this is the *Fatwa*, and all this is patent. Consequently, it is not necessary to specify alone the dictum of Imâm Zuffer reported by Ansâri for the validity of a *wakf* of *dirhems* and *dinars*. ... Thus the Moulana, the *Sahib-i-Bahr* (the author of the *Bahr*) has given a *fatwa* that the *wakf* of *dirhems* and *dinars* is lawful and has not stated any contrary doctrine. In the *Manah-ul-Ghuffâr* it is stated that Ramli[2] thought it doubtful if *dirhems* and *dinars* could be included in those articles which form the subject

Wakf of *dirhems* and *dinars*.

[1] The *Manah-ul-Ghuffâr* and the *Tanwîr-ul-Absâr* are by the same author (Shaikh Shamsuddin bin Abdullah al-Gazzi). The *Durr-ul-Mukhtâr* is a commentary on the *Tanwîr-ul-Absâr*, whilst the *Radd-ul-Muhtâr* is a commentary on the *Durr-ul-Mukhtâr*.

[2] A jurist of Egypt.

وعزاه في الخلاصة الى الانصاري وكان من اصحاب زفر وعزاه

of human transactions, for [he said] that *dirhems* and *dinars* are not such articles as one can retain in specie and yet derive profit from them; and that the *fatwa* given by the author of the *Bahr* without mention of any difference of opinion does not prove that the *wakf* of *dirhems* and *dinars* comes within the meaning of Mohammed's dictum on which is the *fatwa*, that the *wakf* of all articles which forms the subject of human transactions is valid, for it is

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فى الخانيه الى زفر حيث قال و عن زفر شرنبلالية و قال المصنف فى المنح و لما جري التعامل في زماننا فى البلاد الرومية و غيرها في وقف الدراهم و الدنانير دخلت تحت قول محمد المفتي به في وقف كل منقول فيه تعامل كما لا يخفى فلا يحتاج على هذا الى تخصيص القول بجواز وقفها لمذهب الامام زفر من روايه الانصاري والله تعالى اعلم وقد افتي مولانا صاحب البحر بجواز وقفها و لم يحك خلافا - مافي المنح قال الرملي لكن في الحاقها بمنقول فيه تعامل نظر اذهي مما لا ينتفع بها مع بقاء عينها على ملك الواقف و افتاء صاحب البحر بجواز وقفها بلا حكاية خلاف لا يدل على انه راجح تحت قول محمد المفتي به فى وقف منقول فيه تعامل لاحتمال انه اختار قول زفر و افتي به وما استدل به فى المنح من مسئلة البقر الآتية ممنوع بما قلنا ان ينتفع بلبنها و سمنها مع بقاء عينها لكن اذا حكم به حاكم ارتفع الخلاف - ملخصا قلت فيما اجازه ان الدراهم لا تتعين بالتعيين فهي و ان كانت لا ينتفع بها مع بقاء عينها لكن بدلها قائم مقامها لعدم تعينها فكانها باقيه ولاشك فى كونها من المنقول فحيث جري فيها تعامل وجلت فيما اجازه محمد ولهذا لما مثل محمد باشياء جري فيها التعامل في زمانه قال في الفتح ان بعض المشايخ زادوا اشياء من المنقول على ما ذكره محمد لما راوا جريان التعامل فيها وذكر منها مسئلة البقرة الآتيه و مسئلة الدراهم و المكيل حيث قال فغي الخلاصة وقف بقرة على ان ما يخرج من لبنها و سمنها يعطي لابناء السبيل قال ان كان ذلك في موضع غلب ذلك في اوقافهم وجوت ان يكون جائزا وعن الانصاري و كان من اصحاب زفر فيمن وقف الدراهم او ما يكال او ما يوزن يجوز ذلك قال نعم قيل وكيف

possible that the Sahib-i-Bahr has adopted the opinion of Zuffer and given *Fatwa* accordingly.....I [*viz.* the author of the *Radd-ul-Muhtâr*]say that money (*darâhim*, plural of *dirhem*) does not become specific because it is specified, and though it cannot yield profit retaining its specific character, yet not being specific, though it is changed [from time to time] the money into which it is changed stands in its place. Consequently, it may be taken as remaining forever. And there is no doubt that it is a moveable property and, therefore, where it is customary, it will be included in what Mohammed has held to be lawful. And it is for this reason that Mohammed referred to articles which were customary in his own time. The *Fath-ul-Kadîr* says that the Jurists proceeding on what was laid down by Mohammed extended the application of the principle to many other articles that they found customary [in their times].....And in the *Khulâsa* it is stated that the *wakf* of a cow in order that its milk be distributed among the travellers will be considered lawful wherever it is customary. And Ansâri (who was a disciple of Zuffer) was asked, if a person made a *wakf* of *dirhems* and such things as can be weighed and measured whether it would be valid? He answered, 'yes'; on being questioned how that could be, the reply was, in *muzâribat*, and its income will be devoted to the purposes of the *wakf*. [*Muzâribat* is a partnership

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قال يدفع الدراهم مضاربة ثم يتصدق بها فى الوجه الذي وقف
عليه وما يكال او يوزن يباع ويدفع ثمنه مضاربة او بضاعة قال فعلي
هذا القياس اذا وقف كراسن الحنطة على شرط ان يقرض الفقراء
الذين لا بذر لهم ليزرعوه لانفسهم ثم يوخذ منهم بعد الادراك
قدر القرض ثم يقرض لغيرهم من الفقراء ابدا على هذا السبيل
يجب ان يكون جايزا قال ومثل هذا كثير فى الري وناحية رماوند
وبهذا ظهر صحة ماذكره المصنّف من الحاقها بالمنقول المتعارف
على قول محمد المفتي به و انما خصوها بالنقل عن زفر لانها لم
تكن متعارفة اذ ذاك ولانه هوالذي قال بها ابتداء قال فى النهر و
مقتضى مامر عن محمد عدم جواز ذلك اي وقف الحنطة في الاقطار
المصرية لعدم تعارفه بالكلية نعم وقف الدراهم والدنانير تعورف فى
الديار الرومية

in which one partner supplies capital and the other labour]. And things which are capable of being weighed or measured will be sold and the proceeds invested in *muzâribat* or trade."

"The author says, it is upon this analogy that the *wakf* of a measure of wheat with the condition that it should be given to the poor peasantry who are unable to procure seedlings, who, after reaping their crops, should return the wheat, and this measure of wheat should be again given to others who are in the same condition, in this way forever—is lawful and valid. There are many such [*wakfs*,] in Rai[1] and the vicinity of Damawand. From all this it clear that what the author [of the *Tanwîr*] has stated regarding the *wakf*, of *dirhems* and *dinars* being included in the rule of Mahommed on which the *Fatwa* is, *viz* : 'That whatever moveable is customary to be made *wakf* of it is valid,' is correct."..... "In Egypt," adds the author of the *Radd*, "it is not customary in our times to make a *wakf* of wheat. In the territories of Rûm it is customary to make a *wakf* of money."

"According to all the jurists," says the *Fath-ul-Kadîr*, "the *wakf* of all moveables in ordinary use among mankind is valid." "Shâfeï says that everything the sale of which is valid, and which can be renewed from time to time by its usufruct or otherwise, can be validly dedicated, and this also is the opinion of Mâlik and Ahmed ibn Hanbal" . . . . "ornaments can be dedicated, for Hafsa, the daughter of Omar (the Caliph) dedicated her ornaments, and such has been the practice." . . . . . "Ansâri, who was a disciple of Imâm Zuffer, was asked if the *wakf* of money (original, *dirhems*) and whatever can be weighed or measured is valid or not. He replied—yes, a valid *wakf* may be made thereof. Asked how such things can be made *wakf*. He replied—such money should be invested in some partnership business and its profit applied to the purposes of the *wakf*. And if it is an article, it should be sold and its price invested similarly."[2]

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[1] Ancient Rhages

[2] *Fath-ul-Kadîr*, Vol II, p. 636, also in *Surrat-ul-Fatâwa*, p. 427. See also the *Hâwi*.

The above doctrines will explain the following passage in the *Hedâya* :—

"The appropriation of things which are consumed in using such as gold and silver, or eatables and drinkables, is not unlawful according to the generality of the lawyers, but by gold and silver are not to be understood dinars and

The same principle is enunciated in other authorities. For example, in the *Ramz-ul-Hakâik* it is laid down in clear terms, "and the *wakf* of moveables also is valid, as horses, and utensils of war cauldrons, and shrouds and copies of the Koran, law-books, &c., for the *wakf* of these things is the result of necessity and recognised by the conditions of society."

So also in the *Wajîz-ul-Muhît*, "whatever moveable property forms the subject of human transactions, or which it is customary to make *wakf* of, may be legally dedicated . . . Accordingly, where it is customary to make a *wakf* of *dinars and dirhems*, (current coin) it is lawful." And further, "according to Imâm Shâfeï everything which may lawfully form the subject of bargain and sale may validly form the subject of *wakf*." And on this point there is not only a *consensus* among the Sunni Imâms, but also an agreement with the Shiahs who hold the *wakf* of both moveables and immoveables to be valid.

These authorities were evidently not pointed out to the learned Judge who decided the case of *Fatima Bibi* v. *Ariff Ismailjee Bham*.[1]

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dirhems, or what is not ornament And if one should make an appropriation of dirhems or things estimated by measure, or clothes, it would not be lawful. But it is said that in places where this is customary, decrees are given in favour of the legality of the appropriation."

'If it be asked how, that is, how can the money be applied? It is answered that the dirhems may be lent to the poor and taken back again or given in *muzâribat*, and the profit laid out in charity, and wheat may be lent to the poor to sow and then taken from them, and clothes lent them to wear when necessary and then taken back"

"It is not lawful to appropriate moveables, the appropriation of which is unusual or uncommon according to our doctors. The argument of our doctors is, that appropriation requires perpetuity, according to what has been already stated, and this cannot exist in moveables since these are not of a lasting nature, analogy therefore suggests that the appropriation of moveables in general is unlawful; it is admitted, however, in some articles (although contrary to analogy), because of the traditions already recorded and in other articles (such as axes, saws, and so forth) because of utility, but the appropriation of furniture, clothes and slaves is unlawful as being contrary to the suggestions of analogy, because they have neither tradition nor utility to support the legality, and therefore resemble dirhems and dinars;" Hed. II, (Eng Tr.), p 344 Since this was indited the *wakf* of money has been expressly recognised, *Fath ul-Kadîr*, Vol. II, p 636

[1] 9 L. R, Cal, p 66

The Sunni doctrine as to the validity of a *wakf* of moveables including money is repeated in the same terms in the *Tas-hîl*, the *Jouharat-un-Nayerèh*, the *Ghâit-ul-Bayân* and other works. From these principles it will be seen that under the Hanafi Law, the *wakf* of Government Securities, Shares in Companies, Debentures and other stock, is perfectly lawful and valid. The doubt, which one or two of the ancient Hanafi doctors had expressed as to the validity of the *wakf* of certain kinds of moveable property in contradistinction to certain other things, was the outcome of primitive and archaic conditions of society, and was founded on the notion that as perpetuity was essential to the validity of *wakfs*, it could hardly be secured by the dedication of moveable things generally. But as the Mussulman communities progressed in material civilisation and commerce developed, it came to be recognised universally that "the *wakf* of everything, which forms the subject of business transactions or which it is customary in any particular locality to do so, is valid." The observant reader will not fail to see that "custom" or "usage" (*urf*) is an important factor in Mahommedan Law. Like *Istehsân* (liberal interpretation), it expresses the spirit of development. It enables communities to progress and develope in spite of the strict letter of the law.

When a *wakf* is made of articles which are "capable of being weighed or measured," like corn or cloth, they will be sold, and the proceeds will be invested in commerce or partnership business. The *wakf* of such articles as grain-seeds will have effect given to it by being loaned to the poor. The *wakfs* of cauldrons to cook food for distribution to the poor, and other utensils of the like nature are lawful. "In ordinary usage," adds the *Radd-ul-Muhtâr* "analogy (*kyâs*) has no application." In saying that analogy does not apply to usage, the author means to say, that analogy declares that when perpetuity is an essential condition of *wakf*, and a moveable property cannot exist perpetually, a *wakf*, of moveable property *primâ facie* cannot be valid. But, according to present usage, "wherever it has become customary to make *wakf* of any kind of moveable property, it will be held valid notwithstanding that, in the time of the Companions, the custom may not have existed." From this it is evident that the appropriation of moveables depends purely upon the circumstances of the age and the conditions of society and the usages of the people. According to this principle,

the appropriation of mere rights and *profits à prendre* would appear to be valid.

Similarly, the *wakf* of books is lawful. When a *wakf* is made of copies of the Koran for the use of students in a particular mosque, they can be studied only in that mosque and cannot be removed anywhere else. Nor, when a *wakf* is made of books for the people of a particular locality *exclusively*, can the books be taken to another locality.

A *wakf* of warm clothing for the poor to be worn in winter and then returned is lawful.

When there is a dedication of money, it will be applied in commerce or invested in business and the profits arising therefrom will be devoted to the purposes of the *wakf*.

The *wakf* of fruit-bearing trees without the land is lawful.[1]

As regards the *wakf* of a building without the land on which it is built, there seems to have been some difference of opinion on the part of the ancient jurists, though the difference is easily reconcilable if the principle which governs such dedications is properly understood. Allâmah al-Kâsim thought such a *wakf* was not valid, and he appears to have adopted the views of Mohammed and Hillâl ibn Yehya Basrî on this point. But says the *Radd-ul-Muhtâr*, "it is stated in the *Bahr* (*ur-Râîk*) from the *Zakhîria* that where it is customary to dedicate a building without the land upon which it is erected, the dedication of the building without the land is valid; but where it is not customary to do so, the dedication is not valid."

Wakf of building without the land valid.

In connection with this point the *Radd-ul-Muhtâr* mentions a memorable disputation which took place in the presence of Sultan Malik-uz-Zâhir,[2] in a Convocation held for the purpose, between the Allâmah and his celebrated disciple Abdullah ibn Shahna, who held, in opposition to his master, that the *wakf* of a building without the land was valid, that this doctrine had been recognized for over two hundred years, and repeated decisions had been passed in accordance therewith by learned Kâzis. This view of Ibn Shahna was combated by Allâmah Mohammed ibn Zaheera, but has been universally accepted in recent times. The author of the *Radd* lays

[1] *Wajiz-ul-Muhît.*

[2] Probably a son of Sultan Salâh-ud-din (Saladin) born, 1173 – died 1216 A.C.

down the proposition broadly, "that the *wakf* of a moveable thing of which it is customary to make *wakf* is valid; so the *wakf* of a building without the land when it is customary is valid, and this doctrine is not in conflict with the views of those who hold that such a *wakf* is not valid, for the question of validity turns upon the custom recognized in the locality where the *wakf* is made. If people are in the habit of making such *wakfs*, the law will recognize them as valid."

Modern doctrine.

The doctrine, however, now in force is, that the *wakf* of a building without the land is valid and the *fatwa* is accordingly.[1]

The *wakf* of land which is in lease or which is subject to a mortgage is valid.[2]

If a person were to lease his land for two years and then dedicate it, the *wakf* will become binding, [but] the contract of lease will not be annulled, and on the expiration of the term of the lease, the income of the property would be applied to the purposes of the *wakf*. "In the same way in the case of a mortgaged property, the *wakf* will become binding and the proceeds will be applied to the purposes of the *wakf* on the redemption of the property, or on the mortgage ceasing."

Where a house has been made *wakf*, everything that would be included in its sale would be included in the *wakf*, whether it be mentioned or not that the house is made *wakf*, "with all its rights and everything, small and great belonging to it, or in it, or of it." So also in the *wakf* of shops everything is included that would be included in the sale thereof.

In the *wakf* of lands, the buildings and trees standing thereon are included, but not the fruit then on the trees, nor the crop if the land has already been sown. Canes and other plants that are cut annually are not included, but such as are cut biennially are included in the *wakf* of the land.

"Khassâf mentions in his Book on *Wakf*, that when a dedication is made of land for specified purposes with the ultimate reversion in favour of the poor, the buildings on the land, and the palm and other trees are included in the *wakf*. He also mentions that existing fruit is not included in an appropriation of trees, and most of our Shaikhs are of that opinion, and *it is correct*." "When a

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[1] *Jowharat-un-Nayereh.*

[2] *Zakhîrat-ul-Akhyar*; 12 W. R., 498.

wakf is made in the following terms—'I consecrate this my land as a *sadakah* with its rights, and all that is in it, and of it,' and there happens to be at the time fruit on the trees, he ought to bestow the fruit in charity on the poor, though not by way of *wahf* but by virtue of his vow, on a favourable construction, and what is subsequently produced is to be applied to the purposes specified in the *wakf*. Similarly, when a *wakf* is made in the following words, 'my land is consecrated as a *sadakah* after my death, to the end that what produce God may cause to come out of it shall be to the servants of God,' upon the death of the *wâkif* the fruit actually on the trees are not included in the bequest by virtue of the *wakf*."

It is not necessary for the validity of a *wakf*, that the boundaries of the land or house appropriated should be specifically set forth. It is only requisite that what is constituted as *wakf* should be ascertainable. Where, therefore, a house or land is well-known, it may be made *wakf* without specifying the boundaries. "And though the witnesses may testify that the land was not bounded in their presence and they did not know it," the *wakf* will not be invalid on that account.

Mills in a field whether turned by water or hand and Persian wheels and buckets used for raising the water are included in the appropriation thereof.

When a man has appropriated his land without mentioning a right of water or way, both are included "on a favourable construction," because land is not appropriated except on account of what it will produce and for that purpose both rights of water and way are included.

Wakf of *mushâa* valid.

The *wakf* of *mushâa*, in other words, the *wakf* of a share of a property which is capable of partition, but which is not actually made the subject of partition, is valid according to Abû Yusuf. Mohammed, as usual, differs from him, and bases his difference on the difficulty of delivering possession of a property, which was not specifically divided off or apportioned from the rest. Abû Yusuf, however, holds delivery of possession wholly unnecessary in the case of a *wakf*. Kâzi Khân says, "the opinion of Abû Yusuf has been adopted by the jurists of Balkh, whilst that of Mohammed by the Shaikhs of Bokhara." And the *Alamgiri* adds, "the moderns decide according to the opinion of Abû Yusuf, who held that [the

wakf of *mushâa*] was lawful, and *this is approved.*" According to the *Siraj-ul-Wahâj* the *wakf* of *mushâa* is valid by *consensus.*

But where the property is incapable of partition, even Mohammed, in spite of his usual crassness, agrees with Abû Yusuf and holds that the dedication of a share thereof is lawful. For example, the dedication of a moiety of a public bath or *hammam* is valid according to Abû Yusuf as well as Mohammed, "for a *hammam* is not partible." Both Abû Yusuf and Mohammed, however, agree in holding that where a piece of land is dedicated for *erecting* a mosque or *building* a tomb thereon, that piece of land ought to be divided off. The reason of this is apparent. But no division is necessary, according to Abû Yusuf, if the dedication is in *favour* of a mosque or for the maintenance of a mausoleum.

As a consequence of the rule laid down by Abû Yusuf regarding the validity of the *wakf* of a partible *mushâa*, and which has been adopted by the Hanafî jurists universally, it is held that where a person purports to make a dedication of the whole of his property, but for some reason it cannot operate as to the whole, the *wakf* of the undivided share would be valid, *e.g.*, if a woman were to make in her death-illness a *wakf* of her house for her three daughters and after them for the poor and leave no other property but this house, and no other heir but these daughters, according to Abû Yusuf, the *wakf* will take effect with reference to one-third unless all the daughters consent.[1] "In case of any dispute regarding the *wakf* of undivided property, the Kâzi can decree partition."

A *wakf* by two or more individuals of a joint property is valid according to all the jurists.

When two persons are in joint possession of a piece of land and one of them dedicates his share for his children (*i.e.*, his descendants) in perpetuity, so long as any one of them happens to exist, and upon their failure for the poor, and the other partner dedicates his share for his *brethren* and the *people of his family* (*ahl-i-bait*), and on their failure, for the performance of pilgrimages, and both of them consign the trust to one and the same *mutwalli*, such a *wakf* is valid. Similarly, if one of the partners dedicates his moiety for

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[1] *Fatâwa Alamgiri*, Vol. II, p. 455; a *wakf* intended to operate after the death of the *wâkf* takes effect with reference to one-third of the estate of the appropriator; Comp Fulton's Reports, p. 345.

the poor, and the other his moiety for another purpose, it would be valid. This is according to both Mohammed and Abû Yusuf. But the latter does not insist upon consignment to a *mutwalli* as an absolute essential. "And as he does not insist upon consignment or delivery of possession for the validity of a *wakf*, *so according to him partition is not necessary*. And this is the accepted doctrine."[1]

It is not necessary that the property dedicated or the share dedicated should be ascertained at the time. If a person were to dedicate his share in a certain property intending that the dedication should take effect as to the whole of his share, and subsequently his share is found to be larger than what he had supposed, the whole would become *wakf*, *e.g.* "If a person were to declare, 'I make a *wakf* of my share in this house which is one-third,' and it afterwards appears that his share amounts to half or two-thirds, the entire share will become *wakf*." Similarly, "if a man were to say in his will, 'I leave to so-and-so one-third of my property, *viz.*, 1,000 dirhems,' and it turns out subsequently that the one-third of his estate amounts to 4,000 dirhems, the legatee will get the latter sum. This is different from sale in which the vendee would only get the amount specified."

When two persons are jointly entitled to many houses, or where a land is jointly held by two partners, and one of them dedicates his share in all those houses or in that specific land for a pious purpose, and afterwards desires to have a partition of his share effected by the Kâzi, and the Kâzi in effecting the partition allots to the *wâkif* one house or one specific plot for his interest in all the houses or in the entire land, the *wakf* will take effect with reference to that house or that specific plot of land.

Where two persons jointly own a piece of land, either of the co-sharers may make a valid *wakf* of his own share.

A person who takes a lease of *wakf* land may validly build a mosque on it. Question, who should pay the rent of the ground over which the mosque is erected? The author replies by saying, that so long as the lease is in existence the lessee shall pay the rent; and after the expiration of the lease, such rent shall be paid from the public treasury or by the congregation.[2]

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[1] *Fath-ul-Kadîr*, Vol. II, p. 642.

[2] *Radd-ul-Muhtâr*, Vol. III, p. 606. *Majmaa-ul-Anhar*; Kâzi Khân.

When a *wakf* is made of land which is leased to another person, the lease is not cancelled; it continues in force until the end of the term, the rent paid by the lessee being applied during that term to the purposes of the *wakf*, but on its expiration the entire income arising from the leased property is to be applied to such purposes.

As regards the *wakfs* of Kings and Ameers :—

Jagirs (*iktaât*) are of two kinds, one where the land has been granted in fee, that is, the Sovereign has purchased it from the *Bait-ul-mâl* and presented it to the grantee, or it is a portion of the royal domains; 2nd, where the usufruct is only granted, and the jagir is vested in the Crown. In the former case, the grantee may make a *wakf*, in the latter case, not.

In the *Alamgiri* occurs the following remark on this subject :—

"It is a branch or consequence of property being a condition, that the appropriation of *iktaât*, or concessions, is not lawful, except when the concession is of waste land, or of land belonging to the Imâm himself, which he has granted to the person. Nor is the *wakf* of *houz* land in the possession of the Imâm lawful, for it is not his property. And by *houz* is to be understood land which the owner is unable to cultivate and pay its khiraj, or land-tax, and has surrendered it to the Imâm that the yearly profits may be applied in payment of the khiraj."

"If the land has been validly purchased from the *Bait-ul-mâl*, the *wakf* thereof is lawful whether the purchaser be the Sultan or any private person, and the *wakf* will be governed by the conditions which the *wâkif* may validly impose on the *wakf*."

"If the Sultan has even without purchasing it, set apart any portion of the public land, *i.e.*, land which yields revenue to the public treasury, by way of *wakf* of a permanent inalienable character for any charitable or pious purpose, such *wakf* is valid. And the Allâmah Kâsim has given *fatwa* according to this principle, when he was asked regarding the dedication made by Sultan Fârûk, who had set apart a portion of the public lands for the purpose of a mosque; and he also held that no future Sultan could set aside the *wakf*."

The principle then is, that if the Sultan makes any *wakf* from the *Bait-ul-mâl* for any purpose of public utility, such as a mosque, caravanserai, a madrassa, &c., it is valid, for it is lawful to set apart from the public revenue an allowance to maintain such objects;

and the King is authorised to set apart land sufficient to pay the allowance in question, instead of disbursing the expenses periodically from the public treasury. But he cannot make a *wakf* of *public* lands in favour of his children, even though the ultimate reversion may be reserved for the poor. But he may make a *wakf* for any object from which benefit accrues to the generality of Mahommedans, for the *Bait-ul-mâl* is for the benefit of Moslems at large.

CHAPTER VIII.

THE MOUKOOF ALAIHIM; OR, THE OBJECTS OF *WAKF*.

SECTION I.

GENERAL OBSERVATIONS.

THE subject of this chapter forms by far the most important branch of the law relating to *wakfs*. 'In the Mussulman system, law and religion are almost synonymous expressions, and are so intermixed with each other that it is wholly impossible to dissociate the one from the other; in other words, what is *religious* is lawful: what is *lawful* is religious.'

According to *all* the schools of Mahommedan Law, a *wakf* may be created for the benefit of any person or class of persons, or for any object of piety or charity. It may be for children that are *unborn*. If the person or object in whose favour it is created is not in existence at the time of the creation of the trust, it will be applied "for the poor," who are the ultimate recipients of all *wakfs*, unless any other object is named. The words "piety" and "charity" have a much wider signification in Mussulman Law and religion than has hitherto been appreciated. *Khair*, *birr*, *ihsân*, &c., include every purpose which is recognised as *good* or *pious* under the Mahommedan religion and the Mahommedan Law less; and the test of what is "good" or "pious" or "charitable" is the approval of the Almighty. Every "good purpose" (*wajjah-ul-Khair*) which God approves, or by which approach (*kurbat*) is attained to the Deity, is a fitting purpose for a valid and lawful *wakf* or dedication. A provision for one's self, for one's children, for one's relatives is as good and pious an act as a dedication for the support of the general body of the poor. The principle is founded on the religion of Islâm, and derived from the teachings of the Prophet, and therefore any variation of the rule is a direct interference with the Mussulman religion.

Hanafi Law.

Another point worthy of attention in the Mahommedan Law is that every trust for whatever purpose created is *really* and in fact for the benefit of human beings. The religious and legal system of Islâm is founded essentially on the service and well-being of humanity. A dedication may be made for a mosque,—but the mosque is intended for human beings to pray in ; it may be for a school, intended for the instruction of students ; for *khânkâhs*, where a particular class of people congregate for religious exercises, &c.. Every object, therefore, is intended for the spiritual, religious, moral, or material good of human beings. This is the meaning of the terse and sententious rule pronounced by the Prophet "tie up the property and leave its usufruct for mankind." A *wakf*, one made for whatever object, has the effect of "detaining" the property in the custody of the Almighty, its produce alone being applicable for the good of human beings. This is the meaning of the definition given by the law officers in the case of *Mohammed Sadik* v. *Mohammed Ali and others*,[1] that *wakf* implies "the relinquishment of the proprietary right in any article of property such as lands, tenements, &c., and consecrating it in such manner to the service of God that *it may be of benefit to men*." This definition was not invented by them but borrowed from the law-books, and must be read with the explanation given in them.

In the Islâmic system there is no such thing as a dedication "solely to the worship of God." A dedication "solely to the worship of God" is an unmeaning phrase in Islâm. The service of man and the good of humanity constitute pre-eminently the service and worship of God. Everything which is dedicated to God is in reality for the good of mankind ; and everything which is dedicated for the good of human beings, individually or collectively, is for the service of God. Every pious act is *ibâdut*, "the service of God :" to provide maintenance for one's parents, for one's children, for one's poor relations are acts of "*ibâdut*." The essence of every *wakf* is *kurbat*, approach to the Almighty ; prayers are one form of *ibâdut* and *kurbat*.

I have dwelt on this subject at some length in consequence of the erroneous view taken in the case of *Abdul Gane Kasim* v. *Hussan Miya Kahmitulla*,[2] in which the learned Judges enunciated the

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[1] Sel. Rep., p. 17.

[2] 10 Bom. High Court Rep., p. 10.

somewhat startling proposition that a *wakf* in order to be valid must "be solely to the worship of God." It is difficult to understand the meaning of this comprehensive dictum. If that view were correct, a *wakf* to an *Imâmbara*, to a *Khânkâh*, to a *Dargâh*, &c., would be invalidated. It is impossible to gather from the report upon what basis the view was founded, for no single original authority appears to have been cited. As will be seen afterwards, it is in absolute contravention of the Mussulman Law.

Section II.

The Classification of Wakfs.

The Mussulman lawyers divide *wakfs* into three classes, *viz.*—

I. *Wakfs* for the affluent (اغنیا) first and then for the indigent.

II. *Wakfs* for the affluent and indigent alike, in other words, *wakfs* in the benefit of which both the affluent and the indigent are entitled to participate.

III. *Wakfs* for the poor exclusively.

All these *wakfs* are valid and lawful. The first class includes all trusts or dedications in favour of individuals, or one's descendants, or relations, or friends, with the ultimate remainder for the poor, either expressly provided at the creation of the trust or affixed by the law. If the reversion is expressly provided for at the time of dedication, the *wakf* is valid *without any difference of opinion*. But if the poor are not mentioned at the time when the *wakf* is constituted, still it is valid and binding according to the accepted doctrine, the remainder being for the poor by implication of law upon the extinction of the people named.

The second class includes *wakfs* in favour of objects in the benefit of which both rich and poor may participate, *e.g.*, mosques, caravanserais, rest-houses, reservoirs, shrines, hospitals, colleges, cemeteries, &c.

The third class includes *wakfs* in which the poor are solely interested, *e.g.*, *lungar-khânahs*, where the poor alone are fed; charities for distributing doles of food, supplying raiments to the living, shrouds for the dead, poor-houses, hospitals for paupers, &c.

Dealing first with class I, it may be stated shortly that a *wakf* can be validly made in favour of any person or class of persons, subject to the exception immediately following.

It can be made in favour of—

(*a*) a Mussulman or a *Zimmi*, but not in favour of an alien or *harbi* (an inhabitant of the *Dâr-ul-Harb*.)

The Moslem jurists, like the jurists of Christendom until very recent times, denied the privilege of the *jus gentium* to all non-Moslems who did not own allegiance to the Moslem Sovereigns. But they were in advance of the Christian jurists in holding that every Mussulman, of whatever country or race, belonged to one nationality and was entitled accordingly to all the privileges springing therefrom. Like the Christians, they divided the world into two portions, one the *Dâr-ul-Harb*, the country of warfare, and the other the *Dâr-ul-Islâm*, the country of peace. Juridically, all Mussulman nations were at peace with each other. As a matter of fact, no Mussulman Sovereign could declare war against another, without first pronouncing him to be a heretic and beyond the pale of Islâm.

(*b*) of men as well as women ;

(*c*) of majors as well as minors ;

(*d*) of heirs as well as non-heirs ;

(*e*) of one's descendants, kindred, neighbours, &c ;

(*f*) of strangers ;

(*g*) in favour of unborn children ;

(*h*) *under the Hanafi Law*, in favour of the *wâkif* himself at first, and then for other objects, in other words, a *wâkif* may constitute himself the first beneficiary of the trust.

Ultimate reversion.

The ultimate reversion may be *expressly* reserved in these cases for any specific object of *general* benevolence, charity or piety, of a permanent character, such as a mosque, a madrassa, the *rouzah* of the Imâm, an imâmbara, &c., or for the poor at large. Where no such express reservation has been made, the law supplies the deficiency and declares that on failure of the primary object of the *wakf*, it will enure for the benefit of the ultimate recipients of all charity, *viz.*, the poor. *The wakf can under no circumstance fail.*

Hanafi Law.

The *Fath-ul-Kadîr*[1] after stating that "there is an analogy between *wakf* and *mushâriket* (partnership) . . . and its great excellence is that it enables mankind to perpetuate good actions," goes on to say "it is necessary to define its literal signification and its technical

[1] For the authority of this work see *ante*, *p.* 176, footnote.

meaning, its essentials, and its rules. Literally it signifies, *detention*; . . in law . . according to the Disciples, the tying up of the substance of a thing in such a manner that it does not become the property of any one excepting that of God. . . . And the *wâkif* may give the produce to whomsoever he likes, and the reason of it is that though a desire to approach the Deity should form the ultimate motive of all *wakfs*, yet, if, without such an [immediate] desire, a person were to dedicate a property in favour of the *affluent*, the *wakf* would be valid, in the same way as a *wakf* in favour of the *indigent* or for the purposes of a mosque, for in giving to the affluent there is as much *kurbat* as in giving to the poor or to a mosque, and though the profits may not have been [expressly] given in charity [to the poor] on the extinction of the affluent, yet it is *wakf* and will be treated as *wakf* before their extinction. This principle is founded on the reason that the motive in all *wakfs* is to do good to the living in this world and to approach the Almighty in the next."

Wakf on posterity valid.

"And the conditions which are requisite for all acts of bounty or generosity are also required for the valid constitution of a *wakf*, that is, freedom, puberty and understanding. In order to be operative it must operate at once and not be dependent on a contingency; for example, if a man were to say 'this house of mine would be *wakf* for the poor *if* my son comes back,' the house will not be *wakf* even if the son comes back."

"In *wakf Islâm* is not a condition. Consequently, if the *wâkif* make a *wakf* on his children *and* his posterity *and* give it at the end to the indigent, it is lawful. And it is lawful in such a case to give the usufruct (conditioned for the indigent) to the poor of both Moslems and *Zimmis*. The *wâkif* may lawfully condition to give the usufruct solely to the poor of the *Zimmis* and in that will be included the Jews and Christians and Magians; and if he conditions that a special body of them should get the produce such special body will then be entitled to it . . . . whatever condition the *wâkif* makes, if it is not contrary to the *sharaa*, will be lawful. And the *wâkif* may give to whomsoever he likes so long as it is not sinful . . . . And there is no doubt in this that charity for *Zimmis* is *Kurbat* . . . . but it is necessary in the case of a *wakf* [in favour of *Zimmis*] that the object should be *kurbat* according to them as well as ourselves [Moslems]. . . . . So a *wakf* by a *Zimmi* to promote *Hajj* or *Umra* to Mecca

is not valid, for *Hajj* is not lawful according to them. But a *wakf* to the mosque at Jerusalem is valid because both Christians and Moslems regard it as holy."

Then, after dealing with the terms by which a *wakf* may be constituted, which I have explained already, the author goes on to say, "if a man were to say 'this property of mine is for God' it is equivalent to saying 'it is *sadakah-moukoofa*.' . . . . According to the Disciples *wakf* means the tying up of property so as to subject it to the rules governing property belonging to God, and accordingly the right of property of the *wâkif* becomes extinguished and it goes to God, and its benefit is applied for His creatures. According to 'us,' it is clear that the right of the proprietor becomes extinguished if he ties it up for the good of God's creatures, for every property belongs always to God, and so it is written in the lucid language of Kâzi Khân." In other words, a dedication or consecration of property, means only its preservation in the custody of God and not to be descendible or alienable. . . . . "A *wakf* once made cannot be inherited nor sold nor be given by way of gift is clear from the recorded sayings of the Prophet."

Then, after giving the sayings of the Prophet and the examples of the *wakfs* created by the early Disciples and Companions, the author states that it is conclusively established that when a *wakf* is once created it is thenceforward absolutely inalienable and non-heritable, and neither the *wâkif* nor his heirs have any right in or title to it, excepting what may have been specially provided for them in the usufruct. "And like all testamentary dispositions, a *wakf* declared to be operative after the death of the donor may be revoked by him at any time before his death, but if not revoked, it will be operative in respect of a third if not assented to by the heirs." . . . . .

"According to both Abû Yusuf and Mohammed the proprietary right of the *wâkif* is extinguished for ever when once the property has been constituted *wakf*. According to Abû Yusuf the right becomes extinguished by his merely declaring that he has made a particular property *wakf*, and this is also the opinion of the three [other] Imâms, *viz.* Shâfeï, Mâlik and Ahmed [ibn Hanbal] and of the universality of jurists, because the extinguishment of the right of property in a *wakf* is like that in emancipation. Mohammed says

that the *wâkif's* right becomes extinguished on his consigning the property to a *mutwalli*. . . . The rule laid down by Abû Yusuf is most approved by the universality of the learned, and in the *Kinia* it is stated, *that decrees are passed in accordance therewith.* and this is the opinion of the *Mashâikh* of Balkh. . . . . The *Mabsût* has thus answered Mohammed's objections 'Consignment is only intended to evidence the fact that the *wakif* has parted with all interest in the property ; it is not intended for completing the *wakf*. Its object is the protection of the *wâkif* by his withdrawal. When a *mutwalli* is appointed, it is to show that the *wâkif* has no further interest in it.'"

"According to Abû Yusuf the *wakf* of *mushâa* is valid. Owing to the difference of opinion on the question of consignment, Mohammed thinks that when a share of property capable of division is made *wakf*, it ought to be divided off. According to Abû Yusuf such consignment not being necessary, the *wakf* of a *mushâa* becomes complete by the mere declaration of the *wâkif* that he constitutes it *wakf*. The opinion of Abû Yusuf has been followed by the jurists of Balkh, whilst that of Mohammed by some lawyers of Bohkara."

The opinion of Abû Yusuf, as already stated, is binding on the Hanafîs of India. And then the author proceeds to lay down his own view—"in *wakf* there is no *tamlik* or assignment of a right of property (to another) so as to require delivery of seisin or consignment, and therefore without consignment, the right of the *wâkif* becomes extinguished on the declaration." . . . "When the property is not capable of partition, both Abû Yusuf and Mohammed are agreed in holding the *wakf* valid without partition." "When a piece of land is dedicated as a cemetery or to build a mosque on, it must be divided off from the other property of the *wâkif*" . . . .

"If a house be dedicated for the residence of a body of people or for the children and posterity of the *wâkif*, so long as they are in existence, with the condition that on their extinction the rents and profits arising therefrom should be given to the poor, the *wakf* would be valid, and after the extinction of his posterity the house will be let out to tenants and the rent received from them will be expended on the poor. None of the *moukoof-alaihim* (beneficiaries) would be entitled to let it . . . . if his descendants are so many that the house has not sufficient accommodation for all of them, they may occupy it in rotation." . . . . . .

"According to Abû Yusuf the mention of perpetuity or dedication to an object of a permanent nature is not necessary to constitute a valid *wakf*, for the words *wakf* and *sadakah*, either conjunctively or separately, convey the meaning of perpetuity . . . . In the *Barâmika*[1] it is stated that according to Abû Yusuf when a *wakf* is made in favour of specific individuals, on their extinction, the profits of the *wakf* will be applied to the poor." . . . . . .

"A large number of the Companions of the Prophet (may God's blessing be with him), made *wakfs*, and an authentic account of such *wakfs* made by men and women, I have given already.[2] And the *sanads* (authorities) thereof are given in *Khassâf* Among these, which we regard as *sanad* (authority for our rules), are the *wakfs* of [the Caliph] Omar (may God be pleased with him) of his land called *Samagh* at Khaibar ; . . . . that created by Zobair bin Awwâm for (the support of) his daughter who had been divorced [by her husband] ; the *wakf* of Osmân bin Arkam Makhzûmi on his children and descendants of his house called *Dar-ul-Islâm* at *Safa* (near Mecca,) where the Prophet used to preach Islâm and where many of the disciples (among them Omar) accepted the Faith, ... Baihaki in his *Khilafiât* has stated upon the authority of Abû Bakr Obaidullah bin Zubair al-Humaidi that [the Caliph] Abû Bakr had a house in Mecca which he made *wakf* of in favour of his children, and that it is still in existence . . . . . And Saad ibn Wakkâs made a *wakf* of his houses in Medîna and in Egypt in favour of his children and that *wakf* is still in existence ; and [the Caliph] Osmân made a *wakf* of his lands on his descendants and that *wakf* also is still continuing."

Then, after stating that all articles which form the lawful subjects of daily transactions between individuals may be validly dedicated according to the received doctrine, in which the other "Imâms

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[1] See *ante*, p.

[2] The author mentions them, begining with this remark :—"In the traditions there are repeated statements about them, and all the Disciples, the Tâbiïns and their successors have always acted in conformity with them ; and of these are the *wakf* of the Prophet (God's blessing, &c)., [the Caliphs] Abû Bakr, Omar, Osman, and Ali, of Zobair, of Muâz ibn Jabal, of Zaid ibn Thâbit, of Ayesha (the daughter of Abû Bakr), of her sister Asma, of Umm Sulma, of Umm Habîba, of Safiya, of Saad ibn Wakkâs, of Khâlid bin Walîd, of Jâbir bin Abdullah, of Okba bin Aâmir, of Abdullah bin Zubair (may God be pleased with them all.")

are agreed," and giving the opinion of Ansâri on the subject of a *wakf* of moveables, the author proceeds to state, "according to Abû Yusuf, the *wâkif* may lawfully retain the governance of the trust or *reserve the profits for himself during his life.* These two subjects have been fully dealt with by Kudûri. . . . . The Jurists Ahmed, Ibn-i-Abû Laila, Ibn Shabarna, Zuhri and others agree with Abû Yusuf. . . . Mohammed holds a contrary opinion. . . . . Abû Yusuf bases his rule upon the practice and recorded precepts of the Prophet himself, who used to participate in (*lit.* eat out of) the produce of the lands dedicated by him. . . . . Another proof in support of Abû Yusuf's rule is that the meaning of *wakf* is to extinguish the right of property in one's self and consign it to the custody of God. Therefore, when a person reserves the whole or a portion of the profits for himself, . . . it does not interfere with the consecration, for that also implies the approval of the Almighty and is lawful. Nor is the providing of subsistence for one's self contrary to it. For example, if a man were to dedicate a caravanserai and make a condition that he may rest in it, or a cistern, and condition that he should take water from it, or a cemetery, and say that he may be buried there, all this would be lawful. [Further] our Prophet (may the blessings of God be with him) has declared that a man making a provision for his (future) subsistence is doing a pious act and giving charity. This *Hadîs* has been substantially handed down by a large number [of people] and is authentic, and Ibn Mâja reports from Mikdâm bin Maadi Karib that the Prophet declared that no gain of a man is so meritorious as that which is earned by the labour of his hands, and his or her making a provision for the maintenance and support of himself, his family and his dependants, is *sadakah.* And Imâm Nisâï from Bakia and he from Buhair has given the same tradition in these words:—" Whatever thou providest for thyself is a *sadakah.*" Ibn Hâbân in his *Sahih* states that Abû Saîd reports from the Prophet that any one who acquires property in a lawful manner and provides therewith a subsistence for himself and for other creatures of God or clothes himself and them out of it gives alms in the way of the Lord. . . . . And Dar-Kûtni reports from Jâbir that the Prophet (may God's blessings be with him) declared that a man providing subsistence for himself and his children and his belongings and for the maintenance of his and their position is giving charity

in the way of God. . . . . Tibrâni has reported from Imâma that the Prophet of God declared that a man making a provision for his [own] maintenance or that of his wife, his family or children, is giving *sadakah*. And in the *Sahîh* of Muslim it is stated from Jâbir that the Prophet told a man to make a beginning with himself and give the remainder to his family. All these traditions support Abû Yusuf's rule. And Sadr-ush-Shahîd has laid down that decisions are passed according to Abû Yusuf's rule,.....*and we all decide according to that rule.* And the *Mashâikh* of Balkh have adopted the same. And it is also approved in the *Hedâya*, as is evident from the author mentioning the opinion of Abû Yusuf at the end, though he does not deal with it in detail."[1]

Similarly, in the Chapter "On the *wakf* of a man on himself, his children, his kindred, or his neighbours" in the *Fatâwa Kâzi Khân*, the authority of which cannot be disputed, the principle is stated thus, "says Fakih Abû Jaafar (may the mercy of God be with him), if a person were to make a *sadakah wakf* on himself on condition that he should eat the whole or part (of the income) during his lifetime, it is valid according to Abû Yusuf, and the *Mashâikh* of Balkh (may the peace, &c.) have adopted his rule and have held that both the *wakf* and the condition are valid, and Sadr-ush-Shahîd has laid down that decrees should be passed according to the rule of Abû Yusuf." *Fatâwa Kâzi Khân.*

Again, "a person makes a *wakf* for the poor and conditions that the entire [produce] will be for him, and says that it will be lawful for him to eat out of it, Abû Bakr Askâf holds such [*wakf*] to be valid."

And further "if a man were to say 'I have made this *wakf* on myself,' it is valid according to Abû Yusuf, and on his death it will be for the poor."[2]

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[1] *i.e.*, after mentioning the opinion of Abû Hanifa and Mohammed, *Fath-ul-Kadîr*, Vol II, p. 630—638 (*b*). For the conditions the *wâkif* may lawfully make in his favour, see *post*.

[2] رجل وقف على الفقراء وشرط لنفسه الكل وقال على ان لي ان آكل منها قال ابو بكر الاسكاف رح يجوز ذلك ولو قال وقفت على نفسي عن ابي يوسف رحمة الله انه قال يجوز ذلك واذا مات يصير للمساكين

"Or if he were to make a *wakf* on 'the mothers of his children' it would be as valid as the *wakf* on himself."

And again, "Ansâri has stated in his work on *Wakf* that when a person constitutes a *wakf* in the following terms—'This my land is *wakf* for the sake of God in perpetuity and its produce will be applied to my uses as long as I live,' and adds nothing further, it is valid; and when he dies, its benefit will go to the poor."

The same principle is laid down in the *Radd-ul-Muhtâr* in these terms:—"If a person were to make a *wakf* and reserve the produce or the governance of the trust for himself, it would be valid according to Abû Yusuf, and on that is the *Fatwa*," that is, decisions are passed in accordance with that rule. "And that is the opinion of Sadr-ush-Shahîd, and it is the authority among text-writers, and the same has been preferred by the author of the *Fath* [*-ul-Kadîr*], and has been adopted by all the jurists of Balkh. And in the *Bahr* [*-ur-Râik*] it is stated from the *Hâwi* that this rule been adopted for the *Fatwa*, &c."[1]

Trusts for the payment of the debts of the *wâkif*, or for other purposes beneficial to him.

"When a man," says the *Alamgiri* quoting the *Zakhîra*, "has made a *wakf* of land or something else with a condition, that the whole or a part of it shall be for himself while he lives and after him for the poor, the *wakf* is valid according to Abû Yusuf, and the Shaikhs of Balkh have adopted his opinion and ruled accordingly, and the *Fatwa* is in conformity with that opinion as an inducement to the making of *wakfs*. There are several ways in which this may be done, as for instance, by a person saying 'on condition that he will pay my debts out of the produce,' or 'when death happens to me, if I should be in debt, that he will begin with the payment of my debts,' or 'when death happens to such an one, meaning the *wâkif*, take every year one-tenth share of the produce and apply it to the performance of the *hajj* or pilgrimage to Mecca on his account or on the expiation of his vows and so-and-so' (naming something); or 'take every year out of this *sadakah* so many *dirhems* and expend them in such a manner and the remainder on so-and-so.'

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[1] جاز جعل غلة الوقف او الولاية لنفسه عند الثاني وعليه الفتوى كذا قاله الصدر الشهيد وهو مختار اصحاب المتون ورجحه في الفتح واختاره مشائخ بلخ وفي البحر عن الحاوي انه مختار للفتوى ترغيبا للناس في الوقف وتكثير الخير

In all these cases the wakf is lawful. And if the appropriator were to say 'This is a *sadakah-moukoofa* to Almighty God, [and the *mutwalli*] will pass its produce to me while I live,' without adding anything more, it would be lawful, and after his death, the benefit will go to the poor. So also if he should say, 'This my land is a *sadakah-moukoofa*, he (meaning the *mutwalli*) will pass the produce to me while I live, then after me to my child and my child's child and their *nasl* for ever, while there are any and when they cease, to the indigent.' *This is lawful.* So also if he should make it a condition, 'That he may maintain himself and his child and pay his debts out of the produce and that when death happens to him the produce of the estate is for such an one, the son of such an one, and his child and child's child and his *nasl*.' Or, if he should begin by saying 'for such an one and then for himself,' it would be lawful as conditioned, the putting himself, first or last, says Khassâf, making no difference. A person makes an appropriation for the poor with a condition 'that he may eat and feed others (out of its produce) so long as he lives and that after his death it is to be for his child and in like manner to his child's child for ever while there are any descendants,' the *wakf* is lawful with such a condition."[1]

Wakf in favour of descendants.

So also in the *Ramz-ul-Hakâik*, "If the *wâkif* reserves the produce of the *wakf* for himself, that is, if he makes it a condition in the *wakfnamah* that during his lifetime the produce should be applied for his benefit, and after his death to the benefit of so-and-so or any specific object, such a *wakf* is valid according to Abû Yusuf and the *Mashâikh* (jurists) of Balkh are in accord therewith, &c."[2]

In the *Fatâwa Alamgiri* the section dealing with this subject runs thus:—"Section II on *wakfs* on one's self, and on one's children and descendants:—A man says, 'This land of mine is a *sadakah-moukoofa* on myself,' that *wakf* is valid by consensus, so in the *Khazânat-ul-Muftiîn*. Or, he says 'this land is *wakf* for myself and after me on so-and-so, and after him for the poor,' such a *wakf* is

[1] *Fatâwa Alamgiri*, Vol. II, p. 495; I have omitted the authorities cited.

[2] وان جعل الواقف غلة الوقف لنفسه بان قال فى كتابة يصرف الريع اليه مدة حيوته ثم من بعده الى فلان و فلان او على جهات عيّنها جاز ذلك عند ابي يوسف رح و عليه مشائخ بلخ ترغيبا للناس فى الوقف

valid according to Abû Yusuf, so in the *Hâwi*. Or, 'that it is a *wakf* for so-and-so, and then for me, or for me and after me for so-and-so, or for my slaves and after them for so-and-so,' it is valid according to the most approved authorities, so in the *Ghyâsia*."[1]

Similarly, in the *Ghâit-ul-Bayân* :—

"And if a man reserve the income of the *wakf* for himself or the governance thereof, it is valid according to Abû Yusuf. And Ulu'l w'alji has stated in his *Fatâwa* that the jurists of Balkh have accepted the rule laid down by Abû Yusuf; and Sadr-ush-Shahîd also decided in accordance therewith....."Therefore, if he conditioned the whole for himself during his lifetime and after it for the poor, it will be valid."[2]

And the *Tas-hîl* lays down the principle in the same terms :—

"Abû Yusuf has held it lawful for the *wâkif* to make a condition that the profits either in whole or in part should be for himself for his life, and on this is the *Fatwa;* and the Prophet (may the blessing &c.), used to eat himself out of his *wakf*, but the *wâkif* cannot take any share therefrom (*lit.* eat therefrom) unless he so conditions."[3]

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[1] *Fatâwa Alamgiri*, Vol. II, p. 471 Comp. Baillie's Digest (Second Ed.). p. 576. "There is a passage," says the author of the *Radd-ul-Muhtâr*, "in Kâzi Khân, to the effect that 'when a person makes a *wakf* on himself and another, the *wakf* so far as regards that person will be valid and not with reference to himself; and if he says that *that* person shall take after him, the whole *wakf* would be void. "This statement," continues the author of the *Radd-ul-Muhtâr*, "is founded upon *weak* authority, and is evidently an interpolation; in fact it is not recognised as law, and so it is stated in the *Bahr* [*-ur-Raik*]." *Radd-ul-Muhtâr*, Vol. III, p. 598.

[2] فان جعل الواقف غلة الوقف لنفسه او جعل الولاية اليه جاز عند ابي يوسف رح

قال الو لوالجي فى فتاواه و مشائخ بلخ اخذوا بقول ابي يوسف رح والصدر الشهيد كان يفتي به ايضا ترغيبا للناس فى الوقف الى قوله فاما اذا شرط الكل لنفسه ما دام حيًّا ثم على الفقراء فانه يجب

[3] يجيز ابو يوسف رح بشرط المنفعة كلها او بعضها..... لنفسه و فيه وبه يفتي ترغيبا للناس.....واكل عم من وقف نفسه و لم يحل الاكل بلا شرط

So the *Wajiz-ul-Muhît* :—"According to Abû Yusuf no such conditions (as are required by Abû Hanîfa or Mohammed), is necessary, so that if a person makes a *wakf* for himself, or for his slaves who have borne him children, or for his own children, or makes a *wakf* of *mushâa*, it is lawful.[1]

The rule laid down by Abû Yusuf was recognised as the law in force among the Hanafîs in the case of *Doe dem Jaun Beebee* v. *Abdollah Barber*.[2]

The Shiahs and the Shâfeïs differ from the Hanafîs on this point. According to the recognised and accepted Hanafî doctrine, the *wâkif* may reserve the entire produce of the *wakf* property for his benefit during his lifetime, may in fact constitute himself the primary beneficiary of the trust. According to the Shiahs and Shâfeïs, the *wâkif* can, if he is the *mutwalli*, receive the allowance reserved for the trustee. Mohammed agrees with the Shiahs and Shafeïs in holding that the *wâkif* cannot reserve for himself the entire produce of the *wakf* during his lifetime.

Wakf in favour of one's descendants valid without difference.

But as regards the lawfulness of *wakfs* in favour of one's descendants there is absolutely no difference of opinion. All the schools and all the jurists recognise the validity of such *wakfs*. The *Radd-ul-Muhtâr* is so explicit on this point, that the only wonder is that the Courts of Justice should have been misled into a notion that a *wakf* in favour of one's descendants is invalid under the Mahommedan Law.

"It is lawful to reserve the produce of the *wakf* for one's self according to Abû Yusuf; the words *thereafter* and *thereafter* which the *wâkif* mentions has no connection with the present discussion; for example, if a person makes a *wakf* on himself and thereafter on *his* children and thereafter on *their* children, *there is no difference as to the validity of this wakf on such children*; whatever difference there is refers to the reservation by the *wâkif* of the whole of the produce for himself during life, but none as

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[1] و عند ابي يوسف شي من ذلك كله ليس بشرط حتى لو وقف على نفسه او على امهات اولاده او اولاده او وقف مشاعاً يصح عنده

[2] Fulton's Repts, p 315.

to the lawfulness of the dedication in favour of the *wâkif's* children."[1]

This was indited in the middle of the 17th century. The author of the *Majmaa-ul-Anhar*, writing at the end of the last century, states in positive terms that the principle is acknowledged by all the schools and sects. He lays down emphatically that "there is *no difference* if a person condition the profits of a *wakf* for his children, and, accordingly, in such a *wakf* male and female [children] will take together, unless he condition for the male alone."[2] From the time of the Founder of Islâm, until the present day, this has been the acknowledged rule of law among Mussulmans.

As pointed out in the *Radd-ul-Muhtâr* there is absolutely no question about the lawfulness of *wakfs* in favour of one's children. Whatever difference of opinion exists among the several schools or between Abû Yusuf and Mahommed, relates to the reservation by the *wâkif* of the income of the *wakf* for himself during his lifetime.

I have already given some of the texts in which the validity of *wakfs* in favour of the *wâkif's* descendants is recognised. I now proceed to give the rule as laid down in the leading authorities. A special chapter is devoted in every law-work to the subject of these *wakfs*.

In the *Wajiz-ul-Muhît* it runs thus :—

"Chapter relating to a *wakf* on one's children and his *nasl* (descendants) and thereafter on the poor."

In the *Fatâwa Alamgiri* it is headed thus :—"Second section relating to *wakfs* on one's self, on one's children, and on his *nasl*."

In the *Radd-ul-Muhtâr*, it runs thus :—"Section relating to all that pertains to *wakfs* in favour of one's children."

And similarly in every other law-work.

According to Zailye, one of the greatest of Hanafi jurists and whose authority is recognised as undisputable throughout the Sunni world, "if a man constitute a *wakf* with these words, 'this my land

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[1] جاز جعل غلة الوقف لنفسه عند الثاني قوله ثم ولدي حكاية لما يذكره الواقف من العطف بثم في وقفه كقوله ثم من بعدي على اولادي ثم على اولادهم وهذا لا مدخل له في نقل الخلاف لان الخلاف في جعله الريع لنفسه لا لاولاده

[2] *Majmaa-ul-Anhar* (Constantinople Ed.), Pt. II, p 640.

is a *sadakah-moukoofa* for my children or my *nasl* (descendants)', it is valid according to both Abû Yusuf and Mohammed, for the mention of the word *sadakah* [according to Mohammed] shows that the *wakf* is perpetual, and that on the extinction of his children, it would go to the poor who never fail. But if he said 'this my land is *moukoofa* on my children or *nasl*, the effect would be the same according to Abû Yusuf and *this is correct*."[1]

The passage in the *Fath-ul-Kadîr*, dealing with the subject, has been already given, but it may be quoted again with advantage here.

"Islâm," says the author, "is not among the conditions of *wakf*;" in other words, it is not necessary that the object in whose favour the *wakf* is made should be a Moslem nor that the *wâkif* should belong to the faith of Islâm; and then the author proceeds to state the rule as follows, "so if a man were to constitute a *wakf* for his children and his *nasl* (posterity), and destine it after them for the poor, that will be lawful."[2]

In the *Sirâj-ul-Wahâj* it is taken for granted that a *wakf* in favour of the *wâkif's* children and thereafter in favour of the poor is valid:—"And according to the *Wâkiât*[3] if a man were to make a *wakf* of his land in favour of his children and after them destine it for the poor, and some of the children die, the [proceeds of the] *wakf* would be applied to the survivors of the children, and when they [all] die, the *wakf* will be expended towards the poor."[4]

In the *Wajiz-ul-Muhît* the principle is laid down in similar terms:—"Chapter relating to *Wakfs* in favour of one's children and *nasl* and *then* on the poor,"—"where a person makes a *wakf* on his *aulâd* (children), all his *own* children and the children of his sons[5] will be included therein; but there are two opinions regarding the inclusion of the children of daughters

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[1] Mss copy belonging to the Patna Anglo Oriental Library.

[2] اما الاسلام فليس بشرط فلو وقف الذي على ولده نسله وجعل اخره للمساكين جاز

[3] A work of great authority among the Sunnis, Morley's Dig, Introd, p. cclxxxv.

[4] وفي الواقعات رجل وقف ارضًا على اولاده و جعل آخره للفقراء فمات بعضهم يصرف الوقف الى الباقي وان ما توا صرف الوقف الى الفقراء

[5] *Viz*, all lineal male descendants.

. . . . and when a man makes a *wakf* of his land on his *aulâd* (children) and then on the poor, upon the death of any one of the children the interest would devolve upon the survivors, and upon the extinction of all of them, the *wakf* would be applied for the poor. This is different from the case of a *wakf* on so-and-so and so-and-so, naming them specifically among his (the *wâkif's*) children, and then on the poor, in such a case upon the death of any of the specific individuals so named, the share of such deceased would be for the poor, &c."[1] Here it is assumed that a *wakf* in favour of children with an ultimate reversion in favour of the poor is valid.

But the *Fatâwa Kâzi Khân* is conclusive on the point :—

"And Khassâf[2] has laid down that when a man makes a *wakf* in these terms, 'this is my land is a *sadakah-moukoofa* or *moukoofa* and its produce will remain current for me so long as I live, and after me it will be for my children and children's children and their descendants in perpetuity so long as my posterity exists, and on their extinction, it will be for the poor,' it is lawful."[3]

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[1] باب الوقف على الولد والنسل ثم على الفقراء و لو وقف على اولاده يد خل فيه اولاده لصلبه و اولاد ابنائه و فى اولاد البنات روايتان فى ظاهر الروايه لا يدخلون كما فى الامان و لو وقف ارضه على اولاده و جعل اخره للفقراء فمات بعضهم يصرف الوقف الى الباقين فان ما توا صرف الى الفقراء بخلاف ما لو وقف على فلان و فلان و فلان وسمّا هم بعينهم من اولاده و جعل آخره للفقراء ثم مات واحد منهم بعينه يصرف نصيبه الى الفقراء لانه لو وقف على كل واحد منهم بعينه فنصيب الميت لا يستحقه الباقون و فى الاول وقعه على كل اولاده قل او كثر و بعد موت بعضهم بقي اولاده فاستحقه الباقون

[2] Of Khassâf, the author of the *Radd ul-Muhtâr* speaks thus—"Khassâf is an Imâm, whose worth has been testified to by Shams ul Aimma Halwâni, who has declared that Khassâf's views are adopted everywhere," *Radd-ul-Muhtâr*, Vol. III, p 672.

[3] و ذكر الخصاف رح لو قال ارضي صدقه موقوفه او موقوفه تجري غلتها عليّ ما عشت ثم بعدي على ولدي و ولد ولدى و نسلهم ابدا ما تنا سلوا فاذا انقرضوا فهي على المساكين جاز

In the *Hâwi*, as already stated, a work of great authority, frequently referred to in the *Fatâwa Kâzi Khân* and the *Fatâwa Alamgiri*, the principle is thus stated.—"If a person make a *wakf* of a piece of land or garden on the condition that should he be in need of the income, it should be applied to meet his wants, the *wakf* will be valid with the condition; or, if he reserves the entire produce or the governance for himself, it would be lawful; similarly, if he makes a *wakf* with the condition that so long as he is alive he shall eat out of it and feed others therewith, and that upon his death, his children will have the same power and after them his children's children in perpetuity so long as his posterity lasts, *viz.*, that they should eat of the same and feed others too, this *wakf* is valid with the condition. This is according to Abû Yusuf and it is authoritative and the *Fatwa* is thereon."

"If a person says 'this land of mine is dedicated for me, Hillâl says it would not be valid, but all the [other] jurists hold that according to Abû Yusuf it would be valid, and the *Mashaikh* of Balkh have adopted this rule of Abû Yusuf. And they have laid down that both *wakf* and condition are valid; and Sadr-ush-Shahîd has held that . . . the *Fatwa* is on the rule of Abû Yusuf. And if the *wâkif* were to say 'this land of mine is a *moukoofa*, and so long as I am alive the produce is for me, and on my death for my children, and my children's children and their posterity so long as any of them exists, and on their extinction, it will be for the poor,' such *wakf* is lawful."[1]

In the *Fatâwa'l Ankirawia*,[2] the principle is laid down thus:

"Q. What is the rule in a case where a man makes a *wakf* in these terms, this my land is a *sadakah-moukoofa* on my child and my child's child and their children?"

"A. It is lawful, and it will be applied to all of them."

"Q. Would its produce be given to others lower in degree?"

"A. Yes, because such a dedication amounts to a dedication for his descendants so long as his *nasl* (posterity or line) exists, and here three generations (lit., *wombs*) are mentioned, and whenever three generations are mentioned, the right construction is that the *wakf* is for the *wâkif's* posterity so long as they exist."

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[1] *Surrat-ul-Fatâwa*, pp. 443, 444. [2] See Morley's Dig., Introd., p. cexc

Be it noted that as the word *sadakah* is used here in conjunction with the word *wakf*, and accordingly the *wakf* is valid by *consensus*, though the poor are not mentioned as the recipients of the usufruct upon the possible contingency of the *wâkif's* posterity becoming extinct; for, as stated already, according to Mohammed the word *sadakah* implies a dedication to the poor. Nor is there any difference of opinion where the word *sadakah* is not used, but the poor are expressly mentioned. According to Abû Yusuf, however, the use of the word *sadakah* is wholly immaterial; and in the above case, even if the word had not been used, the dedication would have been perfectly valid.[1]

And in the *Jouharat-un-Nayerèh*, there occurs the following passage: "When a man makes a *wakf* in these terms, 'this land of mine is for ever a *sadakah* or *wakf* for the sake of God for my children,' then upon their extinction, the poor will become entitled to its produce." Here it will be noticed, there is nothing certain as to the time when the children will become extinct, and yet the *wakf* is held to be valid.

In the *Ramz-ul-Hakâik* of Allâmah Aini, the following passage is in regard to the same principle:— "If a *wâkif* constitute the proceeds of the *wakf* for his benefit, that is, if it be written in the deed of *wakf* in this way, that the income of the *wakf* should be applied to his benefit (during his life) and after his death to so-and-so, or any specified object, such a *wakf* is valid according to Abû Yusuf . . . . . and the Jurists of Balkh have decided in accordance therewith. . . . And Abû Yusuf bases his rule on the practice of the Prophet who used to eat out of his *wakfs*." There is no mention of children here, but there is no restriction whatsoever; the word *jihat* including a dedication in favour of one's posterity.

In the *Fatâwa Alamgiri* the principle is laid down in similar terms.

First of all, "everything that is said in respect of a *wakf* in favour of one's own children, applies to a *wakf* in favour of another's children."[2] So that there is no distinction between the validity or construction of a *wakf* in favour of one's children, and of that in favour of strangers.

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[1] *Sirâj-ul-Wahâj.*

[2] *Fatâwa Alamgiri*, Vol. II, p. 474.

"When a man has made a *wakf* of his land in favour of his children and after them on the poor, the child [or children] who may be in existence at the time the produce comes into existence will take it, whether he was born at the time of the *wakf* or thereafter."[1]

"And in like manner if he said, 'on my child and what child may be born to me and when they fail, upon the poor' . . . . In such a case the *wakf* is valid."[2]

"And if a man should say, 'I have made a *wakf* on my children,' males and females are included in its benefit."

"If a man were to say '[this my land], is a *wakf* on my child, and child of my child, and child of the child of my child,' mentioning three generations, the income is to be spent upon his descendants for ever so long as there are any, and is not to be applied to the poor; while one remains the *wakf* is for him [or her] unto the very lowest of the descendants,—the nearer and more remote being equal [in the distribution of the produce], unless the *wâkif* declared in making the *wakf* that the 'nearer was nearer' or said, 'on my child and then after them on the child of my child,' or said, 'generation after generation' when a beginning must be made with them with whom the *wâkif* had begun."[3]

"If a man were to say, 'This my land is a *wakf* on my child and my *nasl* (posterity),' the *wakf* is valid."[4]

So also in the *Hâwi*,[5] "If a man were to make a *wakf* conditioning that a portion of the income of the *wakf* should be expended on his needs, the *wakf* is valid, and so is the condition. So also if he were to constitute the entire income for himself, together with the governance thereof, it is lawful....So also if he were to declare that his children and children's children so long as any of the progeny exist will eat out of the *wakf*, *the wakf is valid with the condition*; and the *Fatwa* is thereon."[6]

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[1] *Fatâwa Alamgiri*, Vol. II, p 471 [2] *Ibid.*

[3] *Ibid*, p 474; *Fath-ul-Kadir*, Vol. II, p 643 (*b*). Comp Baillie's Dig (2nd Ed.), p. 577.

[4] *Fatâwa Alamgiri*, Vol. II, p 475.

[5] See *ante*, p. 117, note 4.

[6] This is from the *Fatâwa Alamgiri*, see also *ante*, p 233

The *Majmaa-ul-Anhar* written towards the close of the 18th century thus sums up the result of the authorities :—A *wakf* in favour of one's self is valid according to Abû Yusuf, and on this is the *Fatwa* (in other words, this is the law). A *wakf* in favour of one's children and *nasl* with the ultimate benefit for the poor in case of the failure of the *wâkif's nasl* is valid by *consensus*. If the poor are not mentioned, but the word *sadakah* is used with the term *wakf*, it is valid both according to Abû Yusuf and Mohammed and on the extinction of the *wâkif's* descendants it would be for the poor. Even if the poor are not mentioned and the word *sadakah* is not used, the *wakf* is valid according to Abû Yusuf, and its produce on the extinction of the *wâkif's nasl* or posterity will be spent on the poor, and on this is the *Fatwa*.

With all these authorities clearly and in explicit terms laying down the undisputed and recognised law on the subject, it does seem strange that the Courts of Justice in this country should have taken such a totally different view. The latest case on the point decided by the Calcutta High Court[1] enunciates a somewhat startling proposition for which there does not appear to be any warrant in the Mahommedan Law. It says that "a dedication must not depend upon an uncertain contingency, such as the possible extinction of the family, has recently been well laid down by the Madras High Court in *Pathu Kutu* v. *Anathalakutu*."[2] Speaking with the profoundest respect, this dictum seems to be based on an erroneous apprehension of the Mussulman Law. A *wakf* dependant for its operation upon the happening of a contingency is undoubtedly held to be invalid. Examples of such contingent *wakfs* are given in the law-books, and the smallest reference to any treatise would show what is meant by this rule. For example, if a man were to say, "if my son arrives to-morrow, or if my ship arrives from Basra on Friday next, this house of mine will become *wakf*," the operation of this dedication is *dependant* on the happening of a contingency which may or may not happen ; the son may arrive to-morrow or may not ; the ship may arrive on Friday or not. The *wakf* is not intended to have any effect until the event,

[1] *Rasamaya Dhur Chowdhry* v *Abul Fata Mohammed Ishak*, I. L., 18 Cal, p. 178.

[2] This case has absolutely no bearing on the point in issue.

upon the happening of which it is made dependant, has actually occurred: but as its happening is wholly uncertain and contingent, the *wakf* is held to be invalid, for it is one of the conditions of a *wakf inter vivos* that it should be immediately operative in favour of some object not deemed *sinful* under the Mahommedan Law; or if it is testamentary, it should be similarly operative upon the death of the *wâkif*.

It is difficult to understand what bearing this rule has upon a *wakf* in favour of one's descendants. A provision for one's children and descendants—nay, for one's self—is regarded as a pious duty (*kurbat*). The mention of the poor is required by Mohammed (not by Abû Yusuf "with whom is the *Fatwa*") *not to give validity to the wakf but to ensure perpetuity*; and as human beings are liable to become extinct and as a *wakf* must be a *permanent* dedication, Mohammed required that the poor should be expressly "named," or "implied" by the use of the word "*sadakah*." Abû Yusuf held that whether the poor were named or not, or whether the word "*sadakah*" was used or not, the word *wakf* implied *perpetuity*, and therefore unless some other object was named, on failure of the *wâkif's* posterity, the income would be applied for the poor. There is no question about the validity of the *wakf*; the mention of the poor does not make the *wakf per se* more or less valid; it only ensures perpetuity insisted upon in the law. The view expressed by the High Court in the case above referred to is evidently founded, firstly, upon a misapprehension of the law relating to *contingent wakfs*, and secondly, upon the notion that the ultimate dedication to the poor was the real dedication. There is no indication however, in the judgment of the authority upon which this notion is founded.

In order to understand the nature of the conflict between this decision and the principles of Mahommedan Law, it is necessary to state the facts of the case as appearing in the authorized report.

By a deed dated the 21st of December 1868, duly registered and purporting to be a deed of *wakfnamah*, two brothers named respectively, Abul Hossein Mohammed Abdur Rahman, and Abu Mohammed Abdul Kadir made a settlement of all their immoveable properties in the following terms:—

"For perpetuating the names of our father and forefathers and for protecting our properties, we, leaving ourselves to the mercy and kindness of God

and relying upon the bounty of Providence, and being in possession of sound health of body and mind as enjoined in the Mahommedan Law and fully capable of performing and observing all the religious rites and ceremonies, and of our own free will and accord and without reluctance or compulsion, make this permanent endowment (*wakf*) of all our shares and rights in the immoveable properties, that is, all our pergunnahs, zemindaris, talook, segas, rent-free lands, and all ancestral and self-acquired properties such as purchased at private or auction-sale, and all properties, either standing in our own names or in the names of others, and all our rights and interest in connection with the same, that are in our possession and enjoyment, *for the benefit of our sons and children and the members of our family from generation to generation, and in their absence for the benefit of the poor and beggars and widows and orphans.* We two brothers take upon ourselves the management and supervision of the same in the capacity of *mutwallis* for such time as we may live, and as *mutwallis* we enjoy all rights and interest in the *wakf* properties.* * * * * * * * We shall deal in the following way with the net profit that will come to our hands. If it be necessary to bring any suit or put in any answer or objection or claim in respect of these *wakf* properties or the profits, etc., of the same in the Civil Courts* * * * * * * * * then we, the *mutwallis*, shall do those acts according to the laws and rules for the time being, and we shall pay the expenses for the same from the profits of the *wakf* properties. In order to maintain the name and prestige of our family, we, the *mutwallis*, shall make reasonable and suitable expenses according to our means and position in life. We shall, according to our choice, fix allowances for the support and maintenance of the persons who are now living or may be born afterwards for whose benefit the *wakf* is made, and we shall pay the same to them every month, and also the expenses of their marriage and the mourning ceremonies whenever they may be required. It will be competent for us, the *mutwallis* and our successor *mutwallis* to enhance or reduce the allowances of the persons who are now living or who may hereafter be born for whose benefit the *wakf* is made, in consideration of course of their position and circumstances and the state of the income of the *wakf* properties * * * * * * to use the *wakf* properties as security and grant *putni* and *durputni* and permanent and temporary *ijara* settlements, and to purchase some other properties with the money to be received as *salami* for the aforesaid settlements, and to exchange any of the lands in this *wakf* with some other lands or to include the lands so acquired by purchase or in change in the *wakf*, to spend the profit of the same towards the expenses of the *wakf* and keep the surplus profit in stock in the *tahvil*, and to try to increase the *wakf* properties and the amount in cash. Whatever properties may be acquired by us the *mutwallis* or our successive *mutwallis* after execution of this document shall be in this way *wakf*. * * * * * * * * * * * * * * * * * None of the persons for whose benefit the *wakf* is made shall be able to make any claim for taking any of the *wakf* properties or to sell or mortgage or to make any gift of his allowance, and the allowance shall not be attached and sold in execution of any money decree against any of those persons because the *wakf* properties have been settled only for the support of our sons, grandsons, etc., from generation to generation. It will not be competent for any of the persons for whose benefit

the *wakf* is made to call upon the *mutwalli* or *mutwallis* to submit any accounts in respect of the *wakf* properties, or to bring any suit in any Court against the *mutwalli* or *mutwallis* for increasing his allowance or for taking possession of the *wakf* properties, or for any accounts in respect of the same, and if any such suit is brought it will be rejected by the Court, but it will be competent for any of the persons for whose benefit the *wakf* is made to ask the *mutwallis* for increasing his allowance or for any occasional expenses and if the *mutwallis* are satisfied that he is actually in need or want, then the *mutwallis* will increase his allowance or meet his demands. The principal object of this *wakf* is that there is to be no loss to the properties, and that the profits of these properties be appropriated towards the maintenance of the name of the family and the support of the persons for whose benefit the *wakf* is made. * * * * * * Be it known here that up to the time of executing the document we are not indebted to any one, that, without keeping in our possession even a very small portion of the properties that are in our possession, we make a *permanent wakf* of all our properties and take in our possession and custody the documents and other papers in connection with the *wakf* properties that will furnish sufficient information and description regarding the *wakf* properties, and so no schedule thereof is given below."

The terms of the deed showed an absolute and immediate dedication of the properties.

The deed also contained provisions regarding the appointment of new *mutwallis*, and for the appointment of any of the settlors' male descendants as *mutwallis*.

After the execution of this deed, Abdur Rahman and Abdul Kadir dealt with the properties as *wakf* properties. They held themselves out as *mutwallis*, and for some years described themselves as such in collection and other papers connected with the management of the properties. In 1281 (1874) Abdur Rahman was in difficulties; and on 13th Kartick 1281 F.S. (7th November 1874), he executed an *ijara putta* for Rs. 4,200 per annum of his share in the properties in favour of his brother, Abdul Kadir, and Abdul Kadir executed a *kabuliat* or counterpart thereof in favour of Abdur Rahman on 12th Joiste 1282 F. S. (1st June 1875). Both the deeds were duly registered, and in them the two brothers declared that by reason of their necessities they had revoked the *wakf* of the 21st December 1868, which under the Mussulman Law they had absolutely no power to do.

In 1288 (1881) Abdur Rahman and Abdul Kadir made a formal partition of all the *wakf* properties. In this deed of partition, which was executed on 27th Bhadro 1288 F. S. (11th September 1881), it was stated that the *wakf* of 21st December 1868 was

invalid, as the *wakfnamah* did not contain the word *sadakah* or charity, and was not made according to the provisions of the Mahommedan Law.[1] After the execution of the deed of partition, Abdul Kadir and Abdur Rahman each dealt with his share as exclusively his own. And Abdur Rahman, who had now become heavily involved, mortgaged and alienated several parcels of the property. If the *wakf* was, in its inception, valid, none of these acts, which amounted to misfeasance on the part of the trustees, could affect the validity of the dedication or of the trusts of the deed.

On the 6th March 1888, Abdul Fata Mohammed Ishak on behalf of himself and his minor brothers, the sons of Abdur Rahman, instituted this suit as beneficiaries under the *wakf*, *inter alia* to have it declared that all the properties were *wakf*, to recover from the transferees the properties alienated by their father, Abdur Rahman (defendant No. 1), and to have him removed from the post of *mutwalli*.

The material issues in the case were the following :—

11*th*.—Whether the *wakf* deed propounded by the plaintiffs was valid? If so, what relief the said plaintiffs were entitled to?

12*th*.—Whether the *wakf* deed in dispute was bad in law, fraudulent and collusive and whether it was ever acted upon?

13*th*.—Whether the disputed *wakf* was cancelled by the subsequent acts and conduct of the defendants Nos. 1 and 2?

The Subordinate Judge found that Abdur Rahman and Abdul Kadir had executed the *wakfnamah*; that at the time of its execution they were joint-owners in possession of the *wakf* properties, that they were *free from debt*, sound in mind and body, and had of their own accord and free will and in good faith made the *wakf* for the purpose of dedicating their properties to the service of God; that after the execution of the deed they had acted as *mutwallis*, supported the beneficiaries, kept up a Madrassah for teaching the Koran and other religious books of the Mahommedans, and had described themselves as *mutwallis* in collection papers, *chittas*, *terij taujee*, and other documents connected with the management *wakf*; that five or six years after the execution of the *wakfnamah*,

[1] This was evidently in consequence of the decision in 8 Cal. L. R., p 167.

Abdur Rahman was much involved in debt and on 27th Bhadro 1288 (11th September 1881) had partitioned the *wakf* properties with his brother Abdul Kadir, that shortly after the partition Abdur Rahman, without the knowledge or consent of Abdul Kadir, had transferred, mortgaged and granted leases of some of the *wakf* properties, and that he had been guilty of waste and misconduct. The Subordinate Judge held that the deed was valid and irrevocable under Mahommedan Law; that Abdur Rahman should be removed from the office of *mutwalli*; that defendant No. 2 should be appointed sole *mutwalli* and that the transfers, mortgages, and leases, etc., executed by the defendant, Abdur Rahman, were invalid and should be set aside. He accordingly gave the plaintiffs a decree.

The defendant appealed to the High Court. The learned Judges, who decided the case, after setting out the above facts, said as follows :—

"The learned Advocate-General contended that the decisions in *Abdul Ganne Kasam* v. *Hussein Miya Rahimtulla*[1] and *Mahomed Hamidulla Khan* v. *Lutful Haq*[2] were wrong upon the authority of *Doe dem Jaun Beebee* v. *Abdollah Barber*,[3] a case tried in the Supreme Court of Calcutta before Ryan, C. J., and Grant, J. He also relied upon *Fatima Bibee* v. *The Advocate-General of Bombay*,[4] and *Amrutlall Kalidas* v. *Shaikh Hussein*,[5] and upon the authorities cited by Mr. Ameer Ali in the Tagore Law Lectures for 1884, including Mr. Baillie."

"The judgment of Ryan, C. J., based as it was upon the opinions of the Moulvies to whom the questions of Mahommedan Law were referred, is certainly entitled to very great weight, but all that that judgment decides in respect of the validity of a *wakf* is that an endowment to charitable uses is valid, though qualified by a reservation of the rents and profits to the donor himself during his life, and that the donor may appoint himself *mutwalli* and need not deliver possession to another. It does not declare that a *wakf* which on the face of it is not an endowment to religious or charitable uses is valid, and that is the question now before us. That judgment does show that the decisions in *Abdul Ganne Kasam* v. *Hussein Miya*

[1] 10 Bom H C, p. 7
[2] 8 Cal L. R, p 167.
[3] Fulton's Repts, p 345.
[4] I L, 6 Bom, 42.
[5] I L, 11 Bom, 499.

Rahimtúlla and *Mahomed Hamidulla Khan* v. *Lutful Haq* went too far in holding that a valid *wakf* must from its creation be solely and exclusively for religious or charitable purposes, but it does not show that they were wrong in laying down that the primary and substantial objects must be of that nature. And in the case of *Doe dem Jaun Beebee* v. *Abdollah Barber* the benefit to the religious purposes indicated in the deed were not wholly and indefinitely postponed to the interests of the donor, and his descendants so long as any of the latter should continue to exist; but the reserve was in favour of the donor himself and of certain persons only who were already in existence.

"The other two cases relied upon by the Advocate-General, *Fatima Bibee* v. *The Advocate-General of Bombay*, and *Amrutlall Kalidas* v. *Shaikh Hussein*, seem to lay down practically that a perpetuity in favour of the donor and his descendants is a valid *wakf*, if an ultimate dedication be made in favour of some religious or charitable object upon the occurrence of a contingency, however, remote and improbable. And we are not prepared to follow this ruling unless we find it irresistibly supported by unquestionable authority. Baillie, no doubt, as well as the learned Tagore Law Lecturer of 1884, seem to favour this interpretation of the law, but the *Hedâya* as translated by Hamilton, and most of the cases laid before us, seem to us to establish the fact that a *wakf* must be in favour of a religious or charitable purpose, although there may be a temporary intermediate application of the whole or part of the benefits to the appropriator's family. All the cases that expressly sanction this latter arrangement were cases in which at least the ostensible and principal object of the *wakf* was religious or charitable. And that the dedication must not depend upon an uncertain contigency such as the possible extinction of the family, has recently been well laid down by the Madras High Court in *Pathunkutti* v. *Anathalakutti*.[1]

"We have the authority of the Privy Council in the case of *Mahomed Ashanulla Chowdhry* v. *Amirchand Kundu*[2] cited by Mr. Evans for refusing to recognize a valid deed of *wakf*, an instrument which uses a particular form of words as a veil to cover arrangements for the aggrandisement of the family and to make their property inalienable.

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[1] I. L., 10 Mad., 110.

[2] I. L., 17 Cal., p 498

"Precisely such, in our judgment, is the deed before us, and notwithstanding the fact that for a few years after its execution the owners of the property dealt with it nominally as *mutwallis*, it is certain that they had not really intended to give up their proprietary rights in it. And before very long they abandoned even the semblance of mere trusteeship. We cannot believe that the authors of Mahommedan Law intended that, under cover of a pretended dedication to Almighty God, owners of property should be enabled to secure it for their own use, protect it for ever from their own and their descendants' creditors, and repudiate alienations in respect of which they have received full consideration."

Unfortunately, no original authority appears to have been discussed at the Bar. Certainly there is no reference to any in the judgment. Even Mr. Baillie's Digest is dismissed with a passing remark, nor is any endeavour made to explain or reconcile the principles stated there with the views expressed in the decision of the case. Hamilton's *Hedâya* is referred to as supporting the proposition that a "*wakf* must be in favour of a religious or charitable purpose, although there may be a temporary and intermediate application of the whole or parts of the benefits to the appropriator's family." I have already shown from the recognised authorities how utterly opposed this view is to the principles of the Mahommedan Law, and that there is no warrant for cutting down *wakfs* in the way suggested. Whether there is anything in the *Hedâya* which countenances the view taken, I shall examine later on.

But I may be allowed to remark here that the main idea which underlies the judgment is founded on an inaccurate application of the words "religious" and "charitable." Refering to the judgment of Ryan, C. J., in *Doe dem Jaun Beebee* v. *Abdollah Barber*, the learned Judges say it "does show that the decisions in *Abdul Ganne Kasam* v. *Hussein Miya Rahimtulla* and *Mahomed Hamidulla Khan* v. *Lutful Haq* went too far in holding that a valid *wakf* must from its creation be solely and exclusively for religious or charitable purposes, but it does not show that they were wrong in laying down that the primary and substantial objects must be of that nature." And again, "all the cases that expressly sanction this latter arrangement (*i.e.*, application of the whole or part of the proceeds to the appropriator's family) were cases in which at least the ostensible and principal object of the *wakf* was religious or charitable."

Now in both these passages there is a clear misapplication of the terms "religious" and "charitable." The terms are evidently used in the *English*, and *not* in the *Mussulman*, sense. These terms were foisted in a note, by Mr. Hamilton in his translation of the *Hedâya*, and are not found in the Mahommedan Law. Under the Mussulman Law, every "object of piety" is a fitting purpose for a dedication. It is expressly declared in the Hanafi Law, with which the learned Judges were dealing, that making a provision for one's self, is a pious act. As regards a provision for one's children or kindred there is *absolutely no difference* among the jurists or the several schools. Such a provision in the Mussulman religious and legal system is as much a "religious and charitable purpose" as a dedication for the poor. To confine the word "charitable" to objects which would be called such in the English legal system is, it is submitted, a mistake. The idea that as in *Doe dem Jaun Beebee* v. *Abdollah Barber* "the reserve was in favour of the donor himself and of certain persons only who were already in existence," and consequently made a difference in the validity of the *wakf*, is founded on a misapprehension of the authorities referred to by the Law-Officers of the Court. A more careful study of the Mahommedan Law would show that whether a *wakf* is made in favour of persons in existence or not, it has nothing to do with the validity of the *wakf*.

There is another passage in the judgment which deserves some notice:—"We cannot believe that the authors of Mahommedan Law intended that, under codes of a pretended dedication to Almighty God, owners of property should be enabled to secure it for their own use, protect it for ever from their own and their descendants' creditors, and repudiate alienation in respect of which they have received full consideration." Speaking, again, with every possible respect, it is difficult to follow the exact significance of this sentence, which shows some misconception of the nature and legal effect of a *wakf* under the Mahommedan Law. In using the word "pretended," the whole question for decision is begged. Under the Mussulman Law, a provision for one's self or for one's posterity or kindred is an act of piety, and a fitting purpose for a *wakf*. The word "pretended" used in connection with a transfer, whether by sale, gift or dedication, implies, as I understand it, that though there is an appearance of a transfer,—in reality, the transferor does not part with his proprietary interest. A "pre-

tended" gift means, that whilst the donor purports to give the property to another, he retains it all the while as his own. If possession is transferred in such a case, it is subject to a secret trust for the donor. Similarly, in the case of a "pretended" sale or dedication, the vendor or dedicator never parts with the property. It continues his all the while. The words "pretended" or "ostensible" or "colorable" can hardly have any application to a *wakf* in the Mahommedan system, for when a *wakf* is once made, the *wâkif's* proprietary right in the *property* "drops" altogether,—in other words, becomes extinguished by operation of the law. The property is is thenceforth "in the custody of God." If the *wâkif* is in debt *at the time of the dedication*, the law lays down rules as to how, under the circumstances, the *wakf* should be dealt with. But if he was *not in debt at the time*, or had other property from which the debt could be discharged, his creditors have no right to look to the property for the satisfaction of their debts, for the property is no more his. If he has any interest in the usufruct, such usufruct may be available *during his life-time* for the payment of his debts.[1] If his descendants are the beneficiaries and any of them contracts a debt, his allowance *during his life-time* may be available for the payment of the debt, so far as possible—subject to the right of his wife and children to maintenance, which is a right superior to that of a creditor, especially of one who, with his eyes open, lends money to inpecunious debtors.[2] But neither the *wâkif* nor his heirs can in any way burden or alienate the property, whether for consideration or not. Any dealing with the property contrary to the conditions of the deed of *wakf* is a breach of trust. This, it is submitted, is the Mahommedan Law; and the importation of the word "pretended" cannot in any way affect the legal consequences resulting from the conduct of a person, competent at the time to make a valid and binding dedication which becomes, under the law, operative and irrevocable immediately.

The case of *Mahomed Ahsanulla Chowdhry* v. *Amar Chand Kundu*,[3] no doubt, lends some colour to the view taken by the High Court in the case under discussion. But in *Ahsanulla Chow-*

Mahomed Ahsanulla Chowdhry v. Amar Chand Kundu.

[1] *Surrat-ul Futâwa*, p 425.

[2] *Ibid*, unless there is a condition in the deed of *wakf* that upon the allowance holder becoming indebted or insolvent, the allowance would go to others.

[3] I L, 17 Cal, p 498.

dhry, their Lordships of the Privy Council declined to lay down any general principle. No doubt it was suggested at the Bar that the question to try was "whether the primary object of the deed was charitable, or whether the real purpose was to provide for the family." Their Lordships, however, in deciding the case carefully guarded themselves against laying down "any precise definition of what will constitute a valid *wakf*, or to determine how far provisions for the grantor's family may be engrafted on such a settlement without destroying its character as a charitable gift."

The words used by their Lordships may, perhaps, be open to the construction which the Law-Courts of this country are beginning to put upon them, and the effect of which is to abrogate an important branch of the Mahommedan Law, but a careful examination of the case will show that the Judicial Committee did not intend to go beyond the facts of that case which were somewhat peculiar, and such as might give rise to doubts in the minds of English lawyers. Paragraph 8 of the deed of *wakf*, which gave to the *mutwallis* the power of increasing their own salaries at their own discretion was objectionable and, perhaps, invalid. But under the Mahommedan Law, an invalid condition in the *wakf-namah* does not invalidate the *wakf*, but is itself void. It is more than probable that had the authorities been carefully placed before their Lordships, they would have taken a different view of the case ; for they say: "On the other hand, they (their Lordships) have not been referred to, nor can they find, any authority that, according to Mahommedan Law, a gift is good as a *wakf* unless there is a substantial dedication of the property to charitable uses at some period of time or other." No authority seems to have been cited in support of the validity of such *wakfs*, a point on which there is absolute *consensus ;* no Arabic law-work was referred to, and the case both in this Court and before the Judicial Committee was discussed upon the wholly erroneous notion that a *wakf* in order to be valid must be a substantial dedication to what is called "charitable uses" in English Law. The word "charity," as understood in the Mahommedan system, was not explained ; nor was it pointed out that, under the Mussulman Law, a provision for one's family is the highest act of charity and a "tying-up" of property for the support of one's descendants as substantial a dedication "to charitable uses," as "if the beginning had been made with

the poor," to use the language of the *Radd-ul-Muhtâr*. Nor does it appear to have been shown from the works to which I have referred here, that when a *wakf* is created in express terms, the non-mention of the poor as the ultimate beneficiaries upon the failure of the primary object or objects, does not affect the validily of the *wakf*, for the law implies as a necessary incident of the *wakf* tenure that the reversion is for the poor, "who are the ultimate recipients of all charities whether named or not," to use the language of the *Ghâit-ul-Bayân*. It was not shown that a *wakf* in favour of unborn children is valid, nor was it pointed out that when the primary object or purpose fails or is for some reason void, the property does not revert to the donor or become the property of his heirs, but is applied to the next succeeding object, or, if none such is mentioned, to the poor. For example, if a *wakf* is created in favour of *A's* children and *A* has no children, the proceeds of the *wakf* would be given to the poor so long as *A* has no children; and if children are born to him then to them,[1] or if a *wakf* is created in favour of *A*, and after him in favour of *B*, and after him for the poor, if the *wakf* in favour of *A* cannot take effect either because he is not existing or because he is incapable of taking, being, for example, a *Harbi* (an alien enemy, in whose favour a *wakf* by a Moslm is invalid), the *wakf* does not fail, but takes effect in favour of *B* and the poor.

There is one other matter in connection with this case which seems to have escaped attention—and naturally, too, because it is connected with the religious system and the inner life of the Moslems. In most *wakfnamahs*, whereby property is dedicated for the benefit of the the family *and* beggars and *wârid-sâdir* (travellers and mendicants), there is no sum fixed for the latter purposes. This is by no means an indication of a motive to leave more for the family. On the contrary, it is owing to the fact that when a fixed sum is specified, no more need be spent, so that whilst a few receive help, the majority are turned away. Under the general provisions all who seek help *must* receive help—and if they do not, the Kâzi's door is open and they get redress either by the removal of the *mutwalli* or by a stricter control.

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[1] See *post* Even Macnaghten gives this principle

The decided cases which were cited at the Bar, are not, I speak with great respect, safe guides. In former times the Courts of Justice took every pains to acquaint themselves with the law that was to be administered. In the case of *Doe Dem Jaun Beebee* v. *Abdollah Barber*, neither of the parties cited original authorities, but the Court of its own motion had the authorities carefully translated. In later times, the citation of original authorities has been discouraged.

Muzhurool Huq v. *Paraj Ditarey Mahaputtar.*

In the case of *Muzhurool Huq* v. *Pahraj Ditarey Mahaputtar*,[1] Kemp J., enunciated his view in regard to charges created upon the profits of a *wakf* estate in these terms :—

"We are of opinion that the mere charge upon the profits of the estate of certain items, which must in course of time, necessarily cease, being confined to one family, and for particular purposes, and which, after they lapse, will leave the whole profits intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Mahommedan Law. A person may make an endowment settling lands on himself and enjoying the profits during his life-time, and after his life-time devoting the profits to the support of the poor, the main object of the Mahommedan Law being that the profits of the land endowed should be endowed for a purpose which always remains in existence."

That view in no way militated with the Mahommedan Law, and may, in the general manner in which it is expressed, be taken as in conformity with that law. For even in case of a dedication pure and simple in favour of the poor, the *wâkif* is empowered under the Mahommedan Law to reserve the whole or a portion of the income for the payment of his own debts, or charge the income with the payment of any item he chooses for a limited period or for the life or lives of an individual or individuals, whose death would set free the whole usufruct for the benefit of the poor. And looked at from this point of view, the principle enunciated by Mr. Justice Kemp may be considered as consistent with the Mahommedan Law applicable to the Hanafi Sunnis. But that case is no authority for the proposition that a dedication for the grantor's family is not valid under the Mussulman Law. If the effect of that decision, however, be, as it has sometimes been supposed, *viz.*

[1] 13 W. R., p. 236

to declare *wakfs* in favour of one's family invalid, then the only thing that can be said is that *that* case is opposed to the law which the Court had to administer.

The case of *Mahomed Hamidulla Khan* v. *Lutful Haq* is, as I have already ventured to point out, in absolute conflict with the Mahommedan Law; and displays some confusion of ideas. The substantial portion of the *wakfnamah* was in these terms: — "I have made *wakf* of 4 annas in favour of *Jamela Khatun alias Dhone Bibee*, daughter of my daughter, and her descendants as also her descendants' descendants' descendants, so long as they may continue to have offspring, and when they no longer exist then in favour of the poor and needy." It will be seen that this dedication complied with all the essential requisites of the law. The learned Judges held, however, as follows:— *Mahomed Hamidulla Khan* v. *Lutful Haq.*

"There has been much argument before us as to the real signification of the term '*wakf*.' There is no doubt that there is a conflict of authority between Baillie and other writers on Mahommedan Law, Macnaghten and Hamilton on this subject. But looking to the principal authority the '*Hedâya*' as read by Aboo Haneefa, who was undoubtedly a Sunni, to which sect the family of Gholam Sharuff belong, and looking to the doctrines of his disciples, it seems to us that the balance of authority is strongly in favour of the view as stated by the Bombay Court in the case of *Abdul Ganne Kasám* v. *Hussein Mirza Rahimtullah*, 10 Bom. H. C. R., 13, *viz.*, that 'to constitute a valid *wakf*, there must be a dedication of the property solely to the worship of God, or to religious or charitable purposes.' Aboo Haneefa undoubtedly in 2 *Hedâya*, H. 334, points out that the appropriation that is *wakf*, must be to some 'charitable' purposes."

"Now here it is manifest that this appropriation in favour of Budrunnissa is not in the nature of a charity. It is simply in the nature of a settlement upon the daughter, a settlement of property which was to be heritable and to be taken by Budrunnissa's descendants in certain shares. The words are clear, each daughter is to take four annas and in the terms of the deed, 'four annas share has been endowed in favour of each of the said ladies.' If, therefore, the principle underlying a *wakf* is charity, and if the ultimate

[2] 8 Cal. L. R., p 164.

application of property, the subject of '*wakf*,' must be to objects which never became extinct, and those objects are all of a religious and charitable character, then this particular appropriation fails to answer to this description. Consequently, the appropriation of the one-fourth share, which is the subject of this appeal, is invalid and cannot be held to be a *wakf*."

"There is, however, some force in the argument which has been addressed to us, that appropriation in the nature of settlement of property upon a man and his descendants have been treated by various exponents of Mahommedan Law as legitimate appropriation under the designation of *wakf*, but these settlements are all under Mahommedan Law termed *Sadakáh* and in the view apparently of Baillie, when a settlement of property is made in this way by a man in favour of his descendants, the term *Sadakáh* must be used; but we do not gather that this term is employed in the deed of 1st Bhadro 1284. But further, even admitting that under Mahommedan Law appropriations or rather settlements of this character can be made, it seems to us clear that the present appropriation falls outside the principle of '*wakf*.' As explained in the case already referred to in 10 Bom. H. C. R., the doctrine of settlement rests entirely upon a saying attributed to the Prophet. 'A man giving subsistence to himself is giving alms,' but this doctrine only holds good according to Hamilton (2 *Hedâya* 351, note) where a man appropriates the whole of his property and so reduces himself to poverty, in which case the charity is as effectual with respect to him (where he necessarily reserves a sufficiency from the product for his own sustenance) as with respect to any other pauper. So that to validate a '*wakf*' by making a settlement of his property on himself, or his descendants, a man must, in the view taken by the Prophet reduce himself to a state of absolute property. In the present case it is clear, and it is admitted by both sides, that there are other properties vested in the appropriator besides those which are the subject of this deed. Consequently, it cannot be said that Budrunnissa has received this property as a pauper."

Speaking with respect, this judgment proceeds upon several erroneous assumptions. In the first place, it is assumed that "there is a conflict between Baillie and the other writers on Mahommedan Law, Macnaghten and Hamilton." Macnaghten never pretended to write an exhaustive treatise on Mahommedan Law; he collected a

few general rudimentary principles, part of which have been found to be either erroneous or incomplete. Hamilton merely translated the Persian version of the Arabic *Hedâya*, often leaving out important passages. In the next place, it is supposed that the *Hedâya* was written by Abû Hanîfa, when, as a matter of fact, he had died five centuries before. Then the statement that "to constitute a valid *wakf* there must be a dedication solely to the worship of God, or to religious or charitable purposes," is wholly unsupported by any authority. In the *Hedâya*, the subject of *wakfs* in favour of children is not discussed, there being no difference of opinion on the point between Abû Yusuf and Mohammed. On the question whether a *wakf* in favour of one's self was valid or not, there was a difference between Imâm Abû Yusuf and Mohammed, and consequently the author goes fully into it, and proves on the authority of the Prophet that a *wakf* may validly be created with a reservation by the settlor of the primary interest for himself. This doctrine again is misconstrued upon the authority of a footnote by the translator, and it is supposed that a man must reduce himself to absolute poverty. It is a gloss by Hamilton upon the text and upon the precept of the Prophet which has not been recognised by the Mahommedan lawyers themselves. "A provision for one's self," said the Prophet, "is tantamount to an act of charity," whether he dedicates the whole of his property, or only a portion thereof. The reservation of the income of the *wakf* in whole or in part is considered as a pious and meritorious act. (The word *sadakah* has been translated into *alms-giving*, and it is chiefly due to this that the Courts of Justice have been misled.) The ground upon which a dedication in favour of one's self is held to be valid is that it is a pious act, *viz.*, to provide the means of support for one's self. Considering how unstable fortunes and wealth have been at all times in the East, it was laid down as a precept that when a man placed his property in the custody of God for the benefit of mankind, he might constitute himself as one of the beneficiaries or the sole beneficiary of that of which God was the trustee. The learned Judges further thought that a settlement in favour of children could only be made by the word *sadakah*. It is clear from the authorities already cited that this view is absolutely opposed to the recognised and accepted principles of the law.

Fatima Bibi v. *Ariff Ismailjee Bham.*

The case of *Fatima Bibi* v. *Ariff Ismailjee Bham*[1] was not argued at all, and was decided by the learned Judge on the authority of *Abdul Ganne Kasam* and *Hamidulla Khan*. In this case it was held in direct opposition to the well-recognised rule of Mahommedan Law that a *wakf* of shares in two trading companies was invalid.

One of the learned Judges who decided the case of *Mahomed Hamidulla Khan* had afterwards to consider a similar question

Lachmipat Sing v *Amir Alum.*

in *Lachmipat Sing* v. *Amir Alum*[2] in which he seems to have, to some extent, modified his former opinion. In *Lachmipat Sing's* case the *wakfnamah* provided for the payment of the settlor's debts, for the support of a mosque, for the performance of certain funeral ceremonies of his ancestors and for the maintenance of his descendants. It was not, therefore, "a *wakf solely* and *exclusively* for the worship of God." The learned Judge in dealing with this *wakf* expressed himself in these terms:—

"The next question is, whether or not the *wakf* is a valid one according to Mahommedan Law. There has always been a good deal of controversy in the Courts as to what is essential, and as to what will invalidate a *wakf*. On the one hand, it has been contended that no *wakf* is valid unless it is solely and wholly for pious and charitable purposes enduring throughout all time, and, on the other hand, there have been those who considered that what is practically a perpetual provision for the dedicator's family may be a valid *wakf*.

"The fact that the Subordinate Judge, who tried this case, is himself a Mahommedan gentleman of considerable attainments in Arabic learning, entitles his opinion to peculiar weight in a case of this nature, and he appears to have entertained no doubt, whatever, as to this *wakf* being of a thoroughly legitimate character as to its constitution and objects. And singularly enough, the only matter which strikes us as one in respect of which, with reference to the decisions of the Courts, makes [*sic*] the character of this alleged *wakf* at all doubtful, is the very one which the lower Court has treated as one as to which there could be no dispute as to its being a proper object of *wakf*. For, in the *wakfnamah*, there is

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[1] 9 Cal L. R, p 74.

[2] I L. R., 9 Cal, p. 176. For the *Wakfnamah* see the *App ndix*.

express provision for the maintenance of the dedicator's male descendants, in addition to the strictly pious and religious objects for which the *wakf* purports to have been made. But the Bombay High Court has, by a Full Bench, decided that, to constitute a valid *wakf*, there must be a dedication of the property solely to the worship of God, or to religious or charitable purposes ; see *Abdul Ganne Kasam* v. *Hussein Miya Rahimtulla*.[1] The view has been endorsed by a Division Bench of this Court in the case of *Mahomed Hamidulla Khan* v. *Budrunnissa Khatun*.[2]

"This definition might seem to exclude from judicial recognition a *wakf* of which one object is a provision for the family of the creator of it."

"The lower Court, however, easily disposes of this question by the observation that 'it is quite evident, and there is no necessity to quote any authority on the subject, that a *wakf* for one's self and for one's children is valid.'"

"In the Bombay case, the Judges, after considering all the available authorities on this question, held that the balance was in favour of the dictum to which they gave effect ; and this too was what the Division Bench, of which one of us was a member, decided in the case of *Mahomed Hamidulla Khan* v. *Budrunnissa Khatun*. In that case the alleged *wakf*, which we declined to recognize, had for its object nothing connected with the worship of God or religious observances, and provided only in a very remote contingency for the poor. It was simply a perpetuity for the benefit of the dedicator's daughter and her descendants so long as any should exist."

"The *wakfnamah* now before us is of a very different character, and having regard to the passage in it reciting the fact of dedication, we think that without saying whether or no we are prepared on further consideration to adopt to the full the ruling above mentioned, we can treat this *wakf* as actually fulfilling the condition described, for the maker of the *wakf*, after reciting the whole of his property of every kind, proceeds to declare that all has been endowed by him for the expenses of the *musjeed* and the tombs of the holy personages of his family, the servants of the *Asthána*, and for performing the *urs* and *fateha* at the tomb."

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[1] 10 Bom H C. R , p 7.

[2] 8 Cal. L. R., 167.

"These are the objects of the *wakf*, and they are all distinctly religious. They also involve to some extent charity to the poor."

"We are disposed to hold this, therefore, to be a valid *wakf* within the purview of the rulings quoted."

The distinction which was drawn between the case in question and *Mahomed Hamidulla Khan* was more apparent than real. In the main the dedication was for the descendants of the *wâkif*, coupled with the payment of certain expenses for the *masjid*, &c., and yet the *wakf* was held to be valid. It was supposed that the provision in respect of the latter lent substance to the provision as to the former.

The Subordinate Judge, however, who was a Mahommedan versed in his own law, had held that the very provision which appeared to the High Court doubtful was the one about which there could possibly be no dispute. And no Mahommedan lawyer has held a different opinion.

The authority of these three cases has been discussed with considerable clearness and ability by Mr. Justice Farran in the case of *Amrutlall Kalidas* v. *Shaik Hussein Mahomed Ebrahim and another*.[1] That learned Judge very properly observes:—

"The authority of the cases of *Mahomed Hamidulla Khan* v. *Lutful Haq* and of *Fatima Bibee* v. *Ariff Ismailjee Bham*, is much weakened by the fact of the Judges, who decided those cases, treating what, at most, is but an expression of opinion in *Abdul Ganne Kasam* v. *Hussein Miya Rahimtulla* as a decision, and by the doubt thrown upon them by the Court in deciding *Luchmiput Sing* v. *Amir Alum*, in which one of the Judges, who decided the former of the two cases, sat. The case of *Fatima Bibee* v. *The Advocate-General* was not referred to in either of them, nor in the later case."

Abdul Ganne Kasam v. *Hussein Miya Rahimtulla.*

I now come to the case of *Abdul Ganne Kasam* v. *Hussein Miya Rahimtulla*. Neither in that case, nor in the Calcutta cases which have followed it, was there any reference to the Chief Justice's decision in the case of *Doe dem Jaun Beebee* v. *Abdollah Barber*. No original authority was cited. Various analogies derived from other systems of law were imported into the

[1] I. L., 11 Bom., p 499.

discussion, but the principles of the Mahommedan Law deducible from recognised law-works were noticeable by their absence.

The learned Judges drawing a conclusion from the decision of their Lordships of the Privy Council in *Jewan Dass Sahoo* v. *Shah Kubeer-ood-deen Ahmed* (which had nothing to do with the question under discussion in the Bombay High Court,) say as follows :— "In that case it was held that, according to the Mahommedan Law, it is not necessary, in order to constitute a *wakf* or endowment to religious and charitable uses, that the term *wakf* be used in the grant, if from the general nature of the grant such tenure can be inferred. We think that the converse of this proposition holds good, namely, that it is necessary, in order to constitute a *wakf*, that the endowment should be to religious and charitable uses, and that it is not sufficient that the mere term *wakf* should be used in the grant. To hold otherwise would be to enable every person by a mere verbal fiction to create a perpetuity of any description." A more fallacious piece of reasoning it is difficult to imagine. The conclusion arrived at by the learned Judges repeals at one stroke the most important portions of the Mahommedan Law.

Nizamuddin Gulam and others v. *Abdul Gafur and others.*

In the case of *Nizamuddin Gulam and others* v. *Abdul Gafur and others*,[1] the Bombay High Court (Birdwood and Parsons, JJ) apparently accepted the principle that a Mahommedan could make a valid *wakf* of his property in favour of his descendants, but they held that inasmuch as there was "no express provision at all for the ultimate of the property to any religious or charitable object," the settlement was invalid. Here, again, not a single original authority is referred to. The real question is lost sight of, the principle of the Mahommedan Law is misunderstood, and the case is decided upon inferential reasoning founded upon two earlier decisions which hardly support the view taken by the Judges.

Hedâya.

The *Hedâya* is held responsible for all the present confusion on the subject of *wakf*. But it must be remembered that Hamilton did *not* translate the original work as it exists in the Arabic language. At his instance the Arabic *Hedâya* was rendered into Persian by some Moulvies of Calcutta, who, at their own free-will, interpolated passages into the Persian version probably with the object of elucidating

[1] I. L. 13 Bom. p 264.

the meaning of the author, but the effect of which has been to make "confusion worse confounded." Often, important sentences have been left out, which wholly detract from the value of the translation. It is upon this so-called translation that the decisions are based. With reference to Hamilton's rendering and gloss, Mr. Neill Baillie, the paraphrasist of the *Fatâwa Alamgiri*, speaks thus:— "Mr. Hamilton has unnecessarily restricted the legal meaning [of the word *wakf*] to appropriations of 'a pious or charitable nature.'"

And having regard to the meaning usually attached by English lawyers to the words "charitable" and "pious," nobody who has studied Mahommedan Law will question for a moment the correctness of Mr. Baillie's statement.

Critically examined, however, there is no difference between the *Hedâya* and any of the other works on Mahommedan Law. In the *Hedâya*, the law of *wakf* is dealt with most meagrely; and the subject of *wakfs* on one's "children and *nasl*" is not discussed at all; for with regard to the validity of such *wakfs*, there was no dispute between Abû Yusuf and Mohammed. The matter on which they were at issue, *viz.*, the validity of a *wakf* in favour of one's self, is considered at some detail. But all the commentaries, like the *Fath-ul-Kadîr*, the *Ghâit-ul-Bayân*, &c., treat fully of the subject.

The text is as follows:—

"Abû Hanîfa (may the mercy of God be with him), has said that the right of the *wâkif* is not extinguished in the property dedicated unless the Judge makes a decree or the *wakf* is made dependant on the death of the *wâkif;* therefore [according] to him the *wâkif* should say thus, "when I should die, my house will become *wakf* in this way.' According to Abû Yusuf (may the mercy, &c.), the right [of property] is extinguished by the mere declaration of the *wâkif* 'I have made *wakf* (*wakafto.*) Mohammed (may the mercy, &c.) says the right of the *wâkif* is not extinguished until a *mutwalli* is appointed and the property delivered to him."

"[And] the author (God be pleased with him) says that *wakf* literally means detention, as if they say when tying-up an animal, 'I have tied it up,' the [two] expressions[1] meaning the same. In law,

[1] The original expressions are untranslatable, depending on the conjugation of the root verb.

it signifies according to Abû Hanîfa, the tying up of the substance of a property in the ownership of the *wâkif* and the devotion of its usufruct, amounting to an *aâriat* (commodate loan). [Then] it is said[1] that as the usufruct of a thing is non-existing and as the devotion of a non-existing thing is not valid, *wakf* is not lawful according to Abû Hanîfa, and this is mentioned in the *Asl*."

"But it is most correct, that *wakf* is lawful according to him [Abû Hanîfa] though not absolute—same as an *aâriat*.[2] According to the Two [disciples] IT means the tying-up of the substance of a thing under the rule of the property of Almighty God, whereby the proprietary right of the *wâkif* [therein] becomes extinguished and [it] is transferred to Almighty God for any purpose by which its profits may be applied to [the benefit of] His creatures. Consequently, a *wakf* is absolute, nor can it be sold, nor given, nor inherited."

"And [thus] the word [*wakf*] comprehends both meanings [*i.e.* that put upon it by Abû Hanîfa and that put upon it by his disciples]. Accordingly, preference should be given to the one which is founded on proof. The Disciples' views are based [firstly] on the precept of the Prophet, who told Omar when he was desirous of consecrating his land of *Samagh*, 'consecrate its substance, and it will not be sold, nor given, nor inherited.' *Secondly*, on the necessity that a *wakf* should be absolute, so that its reward may accrue in perpetuity to the *wâkif*; and this can be attained [only] by the extinguishment of the *wâkif's* property [in it], and constituting it Almighty God's,[3] example of which is given in the *Sharaa* [the law] like that of a mosque. Therefore it will be constituted like that."[4]

It will be noticed that throughout this passage there is not a single word justifying the inference that "the dedication must be *solely to the worship of God*." Hamilton translates جعلاه لله تعالى into "dedicating it *solely* to God." How he came to put that

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[1] *i.e.*, some have said

[2] The words in the translation of Hamilton "the appropriator is held to be at liberty to resume it, and the sale or gift of it is consequently lawful," do not occur in the original

[3] Or, "to Almighty God."

[4] *That is*, the legal consequence is the same

construction upon the sentence, it is difficult to determine without examining the Persian version from which his translation was made, but even his rendering does not warrant the conclusion arrived at by the learned Judges in *Abdul Ganne Kasam*, that a *wakf* means a dedication "solely to the *worship* of God."

In page 911, at the end of the Gloss, in the Chapter on *Wakf*, the author of the *Kifâya*[1] distinctly lays down that "the *Fatwa* in all these matters is according to the Disciples [and not Abû Hanîfa] by notoriety and custom, and on this is the *Ijmâa-i-ummat* (concordance of the universality of the people.)"

It is unnecessary to quote authorities in support of the proposition that the views of Abû Hanîfa on these questions have never been recognised as law among the Hanafîs. I shall give only the references to some, such as the *Alamgiri*, *Kâzi Khân*, *Hemâdia*, *Fath-ul-Kadîr*, *Ghâit-ul-Bayân*, *Tahtâwi*, &c.

Commenting on the passage in the *Hedâya* where Hamilton has introduced the words "dedicating it solely to God," the author of the *Kifâya* has this:—"The Disciples say that examples of the absoluteness of *wakf* are given in the *Sharaa* (the law) such as a mosque; for they say the constitution of a mosque is absolute by *consensus*; and that is withdrawal of the right [of property] for some beneficial purpose from one's self without [the subject of the *wakf*], entering into the property of anybody else. But whatever purpose of divine approbation he may have intended, it will be tied-up for that purpose. It is so in all *wakfs*."[2]

And again, according to the Disciples, "the meaning of *wakf* is the extinguishment of the right of property towards God Almighty; consequently the thing dedicated will be tied-up in the ownership of God on condition that its usufruct will be applied to His creatures. So that a dedication of property to Almighty God means a constitution of its profits for human beings."[3]

Even according to Abû Hanîfa, a *wakf* does not mean "the dedication of property to the worship of God" or to "charity," in the English sense of the word, solely or otherwise, for according to the *Kifâya*, Abû Hanîfa held *wakf* to mean, "the tying-up of the

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[1] See Morley's, Dig. Vol. I, Introd., p cclxix.

[2] *Hedâya* printed with the *Kifâya*, Vol II, p. 889.

[3] *Ibid*, p 895.

substance in the ownership of the *wâkif*, and the devotion of its profits on the poor *or on any purpose among good purposes.*"[1]

I will give here another passage from the *Hedâya* which has been subjected to misconstruction. "According to Abû Hanîfa and Mohammed (may God's mercy be with them), a *wakf* is not completed until the *wâkif* constitutes its ultimate benefit (lit. its end) for an object not liable ever to failure. But Abû Yusuf (may the mercy of God be with him), declares that if the *wâkif* names an object which is liable to failure, the *wakf* would [nevertheless] be lawful, and after the extinction of that object it would be for the poor, though they may not have been named [at all]. The contention of Abû Hanîfa and Mohammed is that, as *wakf* means the extinguishment of the right of property [of the *wâkif*] without a transfer to anybody else permanently, like emancipation, if an object is named likely to fail, it will not answer the purpose intended thereby; like a temporary sale, a temporary *wakf* is invalid." "Whilst Abû Yusuf (may the mercy of God be with him) contends that the motive of [creating] a *wakf* is to obtain the approval of the Almighty, and that may be obtained in many ways, for it may be obtained sometimes by dedicating to an object which is liable to become extinct and sometimes by dedicating to an object which may continue for ever, *so that a wakf in either case is lawful.* Some have said *perpetuity* is a condition required by *consensus.* But Abû Yusuf has declared that it is not necessary to mention perpetuity [or a continuing object] [at the time of *wakf*], for he says the words *wakf* and *sadakah* [pious offering] convey the meaning of perpetuity, as I have already stated, and [also] because in *wakf*, like emancipation, there is an extinction of right without a transfer of right [to anybody also]. AND it is therefore laid down in the Book [*Mukhtasar-ul-Kudûri*] that though the poor be not named in a *wakf* yet they will take [on failure of the objects named]. AND THIS IS CORRECT.[2]

The whole of the last few lines has disappeared in Hamilton's translation.

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[1] ان الوقف حبس العين على ملك الواقف والتصدق بالمنفعة على الفقراء او على وجه من وجوه الخير *

[2] *Hedâya* printed with the *Kifâya*, Vol. II, p. 895.

That the rule laid down by Abû Yusuf is the accepted doctrine I have already shown from quotations from all the recognised works of law, such as the *Fatâwa Alamgîri*, *Fatâwa Kâzi Khân*, *Fath-ul-Kadîr*, *Radd-ul-Muhtâr*, *Ghâit-ul-Bayân*, *Tas-hil*, &c., and it is unnecessary therefore to go over the same ground again at any length. It may be convenient, however, to recapitulate as briefly as possible the accepted principles on this branch of the question :—

(1) That a *wakf* is valid and lawful by *consensus*.

(2) That it becomes absolute and operative, according to Abû Yusuf immediately on the declaration of the *wâkif*, in other words, immediately upon his signifying the *factum* of the dedication.

(3) That no specific words are necessary to create a *wakf*. So long as it is evident from the context or the conduct of the *wâkif* that a permanent dedication or settlement was intended, it is enough.

(4) That a *wakf* may be made by a Moslem in favour of any object whether terminable or otherwise not regarded as sinful in the Mussulman Law.

(5) That where a *wakf* is made with the word *wakf* for objects that are terminable or liable to extinction, the ultimate benefit will enure to the 'poor' even though it may not have been destined for them expressly.

It would seem from the language used in some of the cases that it is thought the introduction of the word 'poor' in the case of a *wakf* in favour of one's posterity, is for the purpose of giving a "semblance of charity" to the dedication. This conception appears to underlie almost all the decisions under review. That notion, however, it will now be seen is founded on an erroneous apprehension of the principles of Mahommedan Law. Under the Mussulman Law, perpetuity, express or implied, is a necessary condition in a *wakf*. The *wâkif* must relinquish his right in the property *for ever*. And it must be consigned to the custody of God *for ever*. But it is not necessary that either the word *perpetuity* should be mentioned, or that it should be stated in express terms that the dedication is for ever. If the *wakf* is in favour of an object of an unfailing or permanent character, the dedication is valid and binding without the mention of the word *perpetuity*. If it is in favour of an object or objects, which, in the

course of nature, must come to an end at some time or other, and if the dedication is made with the word *wakf* or any of its equivalents like *sadakah*, then according to the recorded and recognised doctrine, the law will presume that the ultimate reversion is to the poor "who never fail," unless some other object of a permanent character is mentioned. According to Mohammed, if the purpose is of a failing character, such as a *wakf* for one's *nasl*, then either the word *sadakah* (which would necessarily give the reversion to the poor) or the poor should be expressly mentioned. The object therefore of introducing the word 'poor' is not to give validity to a *wakf* in favour of descendants, but to fulfil the requirement of permanency. If the poor are mentioned in a *wakf* in favour of descendants, as the ultimate beneficiaries, the *wakf* is valid according to Abû Yusuf and Mohammed, Hanafîs, Shâfoïs, Mâlikis and the Shiahs. If the poor are *not* mentioned, the law presumes it and supplies the omission according to the accepted Hanafî doctrines. According to the recognised Hanafî Law, a *wakf* in favour of objects liable to fail are as lawful as those in favour of permanent purposes; they as much secure *Kurbat*, "approach to God," as the latter.

And a provision for one's children and kindred is considered so pious, that where a dedication is made for the poor, "commencement should be made with the *wâkif's* descendants, then his kindred, then the neighbours, and then his fellow towns-people."[1]

I come now to another passage of the *Hedâya* which has been subjected to an equal degree of misconstruction, *viz.* where the difference between Abû Yusuf and Mahommed about the validity of a *wakf* in favour of one's self is discussed.

"If the *wâkif* constitute the income of the *wakf* for himself or reserve the governance of it for himself, it is valid according to Abû Yusuf (may God's blessing be with him).

"I (may God be pleased with me) say that there are two [distinct] subjects [or sections] mentioned, *viz.* the reservation of the usufruct for one's self, and secondly, constituting one's self the *mutwalli* thereof.

"The first is valid according to Abû Yusuf, though not so by analogy according to Mohammed. Such is the opinion of

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[1] *Fath-ul-Kadîr*, Vol. II, p. 641; Com. *Tahtâwi* (*Egypt Ed.*), Pt. II, p. 533.

Hillâl of Rai, and has been adopted by Shâfeï. Some say that this difference between the two is founded on the difference between them as to the necessity of seisin and separation less; others say that their difference is with respect to the present case only. And this difference exists whether the *wâkif* reserves a part of the income only for himself during his life, and after his death for the poor, or the whole for himself during his life to go to the poor after his death[1]. If, also, a man were to make a *wakf* reserving the whole or part of the income for his *ummahât-ul-awlad* [pl. of *umm-ul-walad*, mother of his child, *viz.* a slave who has borne him a child], or his *muddabars* [slaves whom he has given a conditional grant of freedom] during their lives, and after their death to the poor and indigent, some say that this is lawful by *consensus*. Whilst others say that in this case also there is the same difference [between Abû Yusuf and Mohammed], and this is correct,[2] for his reserving the income for their use for their lives is the same as if he conditioned it for his own use. Mohammed's argument is this: a *wakf* is an act of bounty in the shape of a transfer of the property [to God], as I have stated before, and consequently to reserve the whole or part of the income [of one's *wakf*], for one's self would make that transfer void, as a *tamlik* [transfer] to one's self is not right,[3] as if a man made a *conditional sadakah*[4] [pious offering] or reserved a part of a mosque for himself. Abû Yusuf bases his opinion upon what is related from the Prophet (may God's blessings be with him), that is, that he used to eat out of the income of his own pious offerings, in other words, his own pious *wakfs;* as the *wâkif* cannot lawfully eat the same without a condition to that effect [the Prophet's consuming the same] shows that it is lawful for the *wâkif* to reserve the produce for himself. *Secondly*, as I have said before, *wakf* implies the extinguishment of the proprietary right in the *wakf* by its transfer to Almighty God with the object of approaching Him, so if one conditions that a part or the whole [of the income] should be for him [during life], it would mean his obtaining for himself [an interest] in what belongs to God; and not that

[1] *Viz.*, Abû Yusuf holds it valid, whilst Mohammed apparently does not
[2] The Author means to say that the fact of there being a difference, is correct.
[3] The property being already his, he cannot transfer it to himself
[4] *Sadakah-munfasa*, charity given to a poor man with a condition that a portion will be the giver's property.

he reserves to himself what [before] was his own ; and it is lawful to reserve an interest in the property which is transferred to God ; thus, if a man were to build a *khân* (caravanserai) or a reservoir, or [dedicate] a piece of land for a cemetery, and condition that he should reside [in the *khân*] or drink water out of the reservoir or be buried in the cemetery, it would be lawful. *Thirdly*, the motive in *wakf* is a desire to approach [God], and to expend the income of the *wakf* upon one's self is an act of piety by which an approach is obtained, for the Prophet has declared that 'a man's provision for himself is an 'act of charity.'"

The *Kifâya* commenting on this passage says, "if the *wâkif* constitute the produce or the governance of the *wakf* for himself, it is lawful. As regards the first, *viz.*, the reservation of the income by the *wâkif*, it is lawful according to Abû Yusuf, and the Jurists of Balkh are agreed thereon, and Sadr-us-Shahîd has declared that the *Fatwa* is in accordance with the rule of Abû Yusuf."[1]

Throughout all these discussions in the *Hedâya* or anywhere else there is not the least trace of a difference of opinion as to the validity of a *wakf* in favour of one's descendants. There is a difference as to a dedication with a reserve of interest in favour of one's self; there is also some slight difference of opinion on the question whether a man may lawfully make a dedication in favour of his slaves (for that is tantamount to a dedication in favour of one's self), but there is no difference of opinion as to the validity of a *wakf* in favour of one's children and descendants. All the Jurists, all the schools, are agreed thereon.

The principles of the Mahommedan Law seem to have been rightly apprehended in the case of *Fatima Bibi* v. *The Advocate-General*.[2] In this case, West, J., said as follows :—"If the condition of an ultimate dedication to a pious and unfailing purpose be satisfied, a *wakf* is not made invalid by an intermediate settlement on the founder's children and their descendants." [It must be noted that this is by consensus, without any difference of opinion

[1] *Hedâya* printed with the *Kifâya*, Vol. II, p. 901.

[2] I. L. 6 Bom., p. 42 ; In the case of *Jugutmoni Chowdrani* v *Romjani Bibee*, (I, L. 10 Cal. 533,) the same mistake was made, *i.e* , that the ultimate purpose should be *expressly* mentioned.

between Abû Yusuf and Mohammed ; according to Abû Yusuf, the law will presume the ultimate dedication to an unfailing purpose from the use of the word *wakf*.]

The learned Judge then goes on to say that "the benefits they [the descendants] successively take, may constitute a perpetuity in the sense of the English Law, but according to the Mahommedan Law that does not vitiate the settlement, provided the ultimate charitable object be clearly designated." This, again, is according to Mohammed and not Abû Yusuf. Apparently, the learned Judge overlooked the difference between the two, and the fact that Abû Yusuf's rule is the recognised law in the Hanafî world. Still there is some basis for the view which he has expressed in the passage last quoted, whereas the other cases seem to be in conflict with the whole body of Moslem jurists and the principles contained in Mahommedan law-books.

As a matter of fact, no analogy drawn from English Law with regard to trusts and settlements can assist in the comprehension of the Mahommedan Law relating to *wakfs*. The Mahommedan Law relating to trusts or consecrations is founded on the ordinances of the Prophet, and the practice of his Companions and early Disciples based on those rules. Under the English Law, a perpetuity is bad. Under the Mussulman Law, without any difference, perpetuity is an essential element in the constitution of a *wakf*. A consecration for one's family and posterity is, in the Mussulman religion and law, a charitable and pious purpose in the strictest sense of the term. But as one's descendants are liable to become extinct at some time or other, the law requires that, in order to ensure perpetuity, the reversion should be to an unfailing object. Under the recognised Hanafî Law, such reversion need not be in express terms, for if no other object is mentioned, in whose favour the *wakf* will take effect upon the extinction of *wâkif*'s descendants, the law itself will supply the omission, and the *wakf* will be for the poor.

I now proceed to give the rules according to which a dedication in favour of one's children and descendants should be applied.

CHAPTER IX.

THE OBJECTS OF WAKF.—(*Continued.*)

SECTION I.

WAKF IN FAVOUR OF ONE'S CHILDREN AND DESCENDANTS.

ACCORDING to all the jurists when a *wakf* is constituted in favour of the *wâkif's* descendants, and they are mentioned in general terms, or when three generations are mentioned, the trust takes effect in their favour so long as they exist. For example, if a man were to say 'this land of mine is a *wakf* for my children,' using the term *awlâd* or *farzandân*, the term being general, it will enure for the benefit of his descendants so long as they are in existence. And so long as a single descendant of the *wâkif* is in existence, no portion of the usufruct will go to the poor.

Similarly, if he were to say this *wakf* is for my child and the child of my child and the child of the child of my child (using the word in the singular, but mentioning three generations), the effect will be the same.

This will be clear from the following passage in the *Fatâwa Alamgiri* :—

"And if a man should say 'this is a *wakf* for [original, *upon*] my child and for the child of my child and for the child of the child of my child,' mentioning three generations, the income is to be expended upon his *awlâd* (children) for ever, so long as there are any descendants, and is not to be applied to the poor; while one remains the *wakf* is to them, and the lowest among them: the nearer and more remote being alike, unless the *wâkif* say in making the *wakf*, 'the nearer is nearer,' or say, 'on my child, then on the child of my child,' or say, 'generation after generation' (*batnan-baad-batn*), when a beginning must be made with them with whom the *wâkif* has begun."

"Or if he should say, this my land is a *wakf* or a pious *moukoofa* on my children (*awlâd*), all generations are included on account of the general character of the name; but the whole is to

the first generation while any remains, and when they are exhausted, to the second, and when they are exhausted to the third and fourth and fifth, all these generations participating in the division, and the nearer and more remote being alike."[1]

This principle is given in identical terms in the *Fath-ul-Kadîr*.

It would be otherwise if he said 'this is a *wakf* for my child (*walad*),' using the singular expression, or even if he said 'my child's child,' unless he extended his meaning by other expressions, indicating that though the term was used in the singular, or though only two generations were mentioned, his intention was to give the proceeds to his descendants so long as they happen to be in existence.

The *Fatâwa Alamgiri* states this principle in the following way :—

"If one should say, 'this my land is a *moukoofa* as a pious offering on my child and the child of my child,' the child of his loins, and the child of his child in existence on the day of the settlement, and those who are born afterwards are included, and the two generations participate in the produce, but none below them are included, nor the children of daughters, according to the *Zâhir-ur-Rawâyèt* ; and the *Fatwa* is in accordance with it. Or if he said, 'this my land is a *moukoofa* as a pious offering on my child (*walad*),' the produce is for the child of his loins, males and females taking equally, and so long as there is in existence one child of his loins, the produce is to him or her only. When there no longer remains one of the first generation (*batn*), the produce is to be expended on the poor, nothing being allowed to the child of a child. But if he had no child of his loins at the time of the settlement, and there was then a child of a son, the produce is to the son's child, none of the generations below him participating with him; the child of a son in the event of there being no child of the loins, thus coming into his place. The child of a daughter is not included, according to *Zâhir-ur-Rawâyèt*, which is correct. If, after this, he should have a child of his loins, the future produce is to be expended on such child. When there is no child of the first and second generations, but there happens to be a third, a fourth and any lower generations, the third generation, and those below them, participate together, even though there should be many of them. Everything that has

[1] *Fatâwa Alamgiri*, Vol. II, p 418.

been said of the words 'my child,' is applicable to the words 'child of such an one.'"

Kâzi Khân states these principles shortly thus: — If a person make a *wakf* of his land for his *walad* (issue of his loins) and after him or her for the benefit of the poor, without mentioning that upon their death, it will go to his or her issue, in such a case according to the jurist Abu'l Kâsim, upon the death of such *walad*, the produce will go to the poor. If he says "this is a *wakf* for my *walad* and my *walad's walad* and after them for the poor," according to Abu'l Kâsim, the produce will be applied to his children and children's children and on the death of the last surviving of the *wâkif's* children's children, the produce will go to the poor and not to the descendants in the third degree. But if he were to say for my *walad* and my *walad's walad* and my *walad's walad's walad*, so that the third generation is (expressly or impliedly) included, the produce would be applied to his descendants in perpetuity, as long as any of them be surviving, and it will not be given to the poor so long as any of his descendants, how ever low, may be in existence. When the *wâkif* has mentioned three generations, it will be applied to his descendants always, so long as they are in existence and the near and remote will be equally entitled to the benefit thereof, unless the *wâkif* has provided that the nearer shall be preferentially entitled, or has said "line after line" or "for my children and after them for their children," and so on. In such cases the commencement of the division will be made as provided for by the *wâkif*.[1]

Mention of three generations equivalent to perpetuity.

In other words, when a man makes a *wakf* for his child (*walad*) and does not mention that it will enure to the benefit of succeeding generations on the extinction of the first, the *wakf* will go to the poor. But if he uses the term *awlâd*, *farzandân nasl*, *akab* or *khalaf*, the *wakf* is for his descendants, male as well as female, in perpetuity. When a general term of this character is used, no further condition is necessary. Similarly, if he mentions three generations as the recipients of the benefit of the *wakf*, it is tantamount to his declaring that it is a perpetual *wakf* in favour of his descendants, and will be applied to their benefit as long as any of them are alive.[2]

A general term is equivalent to saying, so long as his posterity lasts.

[1] Same in the *Hâwi*, *Radd ul-Muhtâr*, Vol III, p 677

[2] *Majmaa ul-Anhar*, Part II, p 641.

If a *wakf* is made in favour of children specifically named, the others not named, will be excluded.

A *wakf* in favour of *A*, and after him for his children (generally) will include all the children, both males and females. Similarly, if a person make a *wakf* for his own children (*awlâd*) both males and females will be included.

If a man were to say, "this *wakf* is for my *walad* and *their* children (*awlâd*) and their children's children (*awlâd-ul-awlâd*), those of his children who were living at the time of the creation of the *wakf*, or who are born afterwards and their children would take but not the children of his children who had died before the *wakf*.

But if he said, the *wakf* is for my *walad* (child or children) and for my *walad-ul-walad* (children's children) and for *their* children's children, then the children of those children who had died before the creation of the *wakf* would participate; for the term "my children's children" refers to all his grandchildren, not merely to the children who are entitled to participate in the *wakf* at its inception.[1]

When a *wakf* is made in the following terms :—

"This *wakf* is in favour of my children that are born and for my *nasl*," any children born afterwards will be included; but if the terms, *their nasl*, had been used the after-born children of the *wâkif* would not have been included.[2]

If the *wâkif* were to say, "it is for my *walad* who are born and for their *nasl* and for all my *walad* who may be born hereafter," his after-born children will take but not their children. If he were to say, "it is for my *walad* who are born and their *nasl* and for any such *awlâd* of mine that are born subsequently," the children of the after-born children will take though not their parents.

Wakf in favour of the children and the poor.

When a *wakf* is in favour of children without any right of survivorship, as each child dies his interest goes to the poor, for the interest of each is separate. But the case is different where there is a right of survivorship or joint tenancy implied from the nature of the grant. For example, if a man were to make a *wakf* in favour of his children and then for the poor; it is clear that the intention of the donor was that the *wakf* should enure to the benefit of the *wâkif's* children so long as any one of them was living, and it is only on their failure that the *wakf* should go to the poor;

[1] *Radd-ul-Muhtâr*, III, p. 678.

[2] *Futh-ul-Kadîr*, Vol II, p 644

consequently when each child dies his interest goes to the survivors, or his or her child as the case may be.[1]

If a man were to make a *wakf* in favour of his wife and his children, upon her death her interest will not devolve upon his child by her alone but will go to all his children, unless there is any provision to the contrary making her interest descendible to *her* children.[2]

If the *wakf* is made "for my sons," or "for my brethren," the females will be included. If a man were to say, "the *wakf* is for my daughters," and he has only sons, the *wakf* will be applied to the benefit of the poor, until a daughter is born to him, or it is shown that the expression had been used by mistake.

If a *wakf* is made generally without any specification regarding the proportion in which the males and females of each line should take the produce, the distribution should take place in the usual proportion of two for each male and one for each female.[3]

The word *nasl* includes all descendants on the male as well as the female side.[4]

Akab and *khalaf.*

The word *akab* or *khalaf* includes descendants through males; *âl*, *jins*, and *ahl-i-bait* of the *wâkif* include those persons who are related to him through the father or grandfather or any other male ancestor. And *kârâbatdâr*, *arhâm* and *ansâb* of the *wâkif* include all those people who are related to the deceased from any ancestor, male or female. The highest ancestor to which the line would be carried is the person who first adopted Islâm.

If a man were to say, "this is a *wakf* for my *walad* and for my *nasl* in perpetuity and that should any one of them die, his or her share should go to his *nasl*," in such case the entire produce would be divided among all the *wâkif's* children and *nasl*; and the shares of those among them who are dead will go to their children.[5]

If a person were to make a *wakf* in favour of his children, and make no provision declaring that upon the death of any one of them his or her share should go to his or her children, such share or interest will merge in the general produce and will be divided among the beneficiaries for the time being.[6] If the *wâkif* makes a

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[1] *Radd-ul-Muhtâr*, p 680.
[2] *Wajiz-ul-Muhit.*
[3] *Radd-ul-Muhtâr*, Vol III, p 679
[4] *Radd-ul-Muhtâr*, Vol III, p 679.
[5] *Ibid.* [Vol III, p. 679.
[6] *Ramz-ul Hakâik*, *Radd-ul Muhtâr*,

condition that upon the death of any of his descendants, his or her share should go to his *nasl*, in that case it would devolve upon all the children of such deceased descendant, and should any of the children be dead, the children of such child would take his or her share. Should he say nothing about the devolution of the share of a deceased descendant, or should he say that the share of such deceased descendant should go to a higher class, and no one of that class is surviving, in both these cases, the entire produce will be divided among the surviving beneficiaries for the time being among the descendants of the *wâkif*, and will not go to the poor so long as any of the posterity of the *wâkif* is living.[1]

Preference to propinquity.

If a man were to say that when one of his descendants dies, his share should go to other descendants of the same degree, in that case the nearest in blood would be preferred to one more remote; and if there be none of that degree, the share would merge in the general produce. For example, if a person die leaving him surviving sister's children and paternal uncle's children, the latter would take his share in preference to the former, being of the same degree though remoter in blood.

According to Kâzi Khân, if a person were to say, "this land of mine is *wakf* on my *walad* (child)," it will go to his own children, and male and female will receive equal shares unless he restricts the *wakf* to male children alone. If there be no child of the *wâkif*, the property would be *wakf* for the poor and not for the remoter descendants of the *wâkif*. If at the time of the *wakf* there was no child of his loins living, but there was a son of the son living, he would get the benefit of the *wakf*. When a man says "this land is *wakf* or *sadakah-moukoofa* for my *walad* and *walad's walad*," the daughter's children will be included. So if he used the expression *awlâd*, the children of sons and daughters are equally included. According to Mohammed, *walad-ul-walad* includes the children of daughters.[2]

If a person make a *wakf* in favour of his children according to their number and their legal shares, and also provide therein that the female children should get no share, unless they are widows, and

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[1] *Fath-ul Kadir*, *Radd-ul-Muhtâr*, Vol. III, p 682, *Majmaa ul Inhar*, Part II p 611

[2] Kazi Khan Vol. IV, p 91 (Mss)

that after the children, the *wakf* should be for their children, and their children's children and their descendants, *on condition, that if any one of them should die leaving children, his or her share should go to such children*, the aforesaid condition would refer to all.[1]

If a man say this is a *wakf* for my sons[2] and he also has daughters living at the time, the daughters will be included; because when a person has got sons and daughters they are mentioned in the masculine gender, and, so also, even should the children be all daughters.

But should he make a *wakf* for daughters whereas he has only sons, the *wakf* will be for the poor and not for the sons [unless it can be shown that it was a mistake and though he used the term daughters he meant sons].[3]

The children of a daughter are included in the term "descendants," *zurriut*. That is, if a person make a *wakf* for his descendants or *zurriut*, the son's children and daughter's children will both be included.

When a masculine term is used collectively it includes the females.

If a person make a *wakf* in favour of his *walad*, and after that upon their *awlâd* and so on, *batn* after *batn*, and provide also that should any one of them die leaving children (*walad*), then his or her share should go to his or her *walad* (child), if such person should die before becoming entitled to a share in the rents and profits, leaving him surviving a child, the latter will take his place and become entitled at the distribution of the profits to the share of his parent. If the *wâkif* die leaving him surviving several children *A*, *B*, *C*, *D*, and *E*, and then *A* dies leaving certain children, the share of *A* would go to his children, in accordance with the conditions laid down by the *wâkif*. And then *B* dies, leaving several children and grandchildren by a predeceased child. Question is, would such grandchildren be entitled to share in the interest of *B* along with his children? Sabki has answered this question

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[1] *Radd-ul-Muhtâr*, Vol III, p 671

[2] The Persian word *farzand* means a son but in the common acceptation of the term, especially in its plural form, it applies to both male and female offspring

[3] From the *Asaâf*

in the negative. He holds that *B's* share would go entirely to the children, and the grandchildren will be excluded. On this point Khassâf agrees with him. But Khassâf holds that upon the death of the last surviving member of the first group, *viz.*, the children of the *wâkif*, the rule will cease to operate ; that is, if *E*, the last surviving son of the *wâkif*, dies leaving a child, his share will not go to this child, but the entire income will be divided among the grandchildren of the *wâkif*, that is, members of the second class, the same rule applying as in the previous case, *viz.*, the share of each member of this class, upon his death, will descend to his children until the class is exhausted, when the distribution would take place according to the number of the third class. According to Khassâf, therefore, the members of each class take *per capita*. According to Sabki, the distribution is *per stirpes*. He holds that as the members of each class die, their shares descend to their children respectively. Jalâl Suyûti differs from both Khassâf and Sabki. He holds that when any member of one class dies, leaving children and grandchildren by a deceased child, the grandchildren and children share in the interests of their grandparent, that is, the grandchildren take the share of their parents, the distribution being *per stirpes*.[1]

Distribution *per stirpes.*

The *Ashbâh* agrees with Sabki, and is followed by all moderns.

The result is, that when the adjunct '*waw*' (and) is used between the lines, then after the extinction of each line the distribution begins again, but when the word *summa* (then) is used the division continues *per stirpes* throughout. And this view is apparently adopted by the majority of Shâfeï lawyers and some of "our own." The consensus of opinion is, that when a person dies during the lifetime of his father, leaving him surviving a child, that child takes his father's share in the interest of the grandfather but acquires no interest in that of his uncle.[2]

If a person make a *wakf* for his *lineal* descendants, the children of daughters will not be included, unless those children are the offspring of husbands who are the lineal descendants of the *wâkif*. If a woman make a *wakf* for her *ahl-i-bait* or her *jins*, her children will not be included unless the father of the children belongs to her *kowm* or tribe.

Wakf for lineal descendants.

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[1] *Radd-ul-Muhtâr*, Vol. III, p. 672 ; *Majmaa-ul-Anhar*, Part II, p. 641.

[2] *Ibid.*

If a man were to make a *wakf* for his or anybody else's descendants, without mentioning the order in which they should enjoy the income of the *wakf*, the near and the remote will take equally, in other words, the division will be *per capita*. For example, if a man were to say, "I make this *wakf* in favour of Zaid's descendants in perpetuity as long as his line lasts," Zaid's children and grandchildren will be entitled to share equally, and there will be no difference between son's children and daughter's children; they will take equally.

This principle applies where no order of succession is indicated by the specification of the line or generation (*batn*). Where the order of the line is not given (*e.g.*, generation after generation (*batnan-baad-batn*), the rents and profits will be divided equally among all the descendants, male as well as female, living at the time of the distribution, the one lower in degree getting the same share as the one nearest. And as each person among them dies, his share merges in the *wakf* estate, and the entire usufruct is divided among the beneficiaries living at the time of the division. If the succession of lines is given, that is, the *wakf*, is in favour of the descendants, "line after line" (*batnan-baad-batn*), in that case it will imply that the nearer line or class takes first and after them the "line" next after.[1]

"If a man were to make a *wakf* on his *walad* and then on the poor, that *wakf* would be applied for the children of his 'loins,' and male and female will be equal therein unless he has specified the sex therein, and so long as one of the children exists, it will be for him [or her], and if he has no child at the time of the *wakf*, but a son of a son, he will take it. But lower heirs will not take any benefit therein; and if there is a daughter's son, he will not be

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[1] Khassâf, Mr Baillie's note will be of interest in this connection

"It appears from these cases that when two or three generations are mentioned separately and then joined by the word "and," all the generations participate together unless there is something to indicate that one generation is to take in succession to another when the first would have an estate for life in possession and the other estates in tail, as it is termed in England There seems to be no reason for a different construction if the settlement were on a person and his children But "with" denotes conjunction as well as "and" A settlement on a person with children, or *bafurzandan* as it would be in Persian, ought therefore, it would seem, to be similarly construed, that is, to him and them jointly" See S D A Reports, Calcutta, for 1853, p 648

included according to the *Zâhir-ur-Rawâyèt*. Hillâl has adopted this, though Mohammed says he will be included, but the *Zâhir-ur-Rawâyèt* is correct. And after the son's son, his lineal male descendants, if any, will take it."[1] So also in the *Radd-ul-Muhtâr* :— "But if a man were simply to say that it was a *wakf* for his *walad*, then the daughter's children will not be included, for *walad* by itself means his own child,...though it includes in the language of custom the son's children, owing to the fact that the son's children are descended from the *wakif*."[2]

"Allâmah Shaik Ali al-Mukaddasi [the author of the *Hâwi* died A. H., 600] has laid down that if a man were to make a *wakf* in favour of his *walad* and the *walad* of his *walad*, in such a case his own children, the children of his sons and the children of his daughters will be included. And Khassâf and Kâzi Khân have adopted this view."[3]

So in the *Fath-ul-Kadîr*, "if a person were to say 'this is a *wakf* on my *walad* and the *walad* of my *walad* [child of my child] and then on the poor,' in this all the children of his loins participate, the children of his daughters alike with the children of his son. And Hillâl and Khassâf have accepted and Kâzi Khân held it to be correct."[4]

If a man were to declare that the *wakf* was in favour of the sons of his *awlâd*, or his *akriba* or his brethren, the females will be included.

Where a *wakf* is constituted in favour of a child (*walad*), and after him for the poor, the child who may be in existence at the time of the existence of the produce enters into the benefit of the *wakf*, whether he was born at the time of the creation of the *wakf* or after it.

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[1] *Fath-ul-Kadîr*, Vol. II, p. 643

[2] "This is the approved doctrine, and Kâzi Khân states it to be the correct view on the basis of the opinion of Mohammed in the *Siyar-ul-Kabîr*. So also in the *Asaaf*; it has been adopted by Kazi-ul-Kuzzât Nur-ud-din of Tripoli, and his disciples Shibli, Ibn-Shahna, Ibn-Nujaim, Hanouti, &c;" *Radd-ul-Muhtâr*, Vol. III, p. 672.

[3] "Khassâf is an Imâm whose worth has been testified to by Shams-ul-Aimma Halwâni who has declared that Khassâf's views are adopted everywhere"—*Ibid* p 672

[4] *Fath ul-Kadîr*, Vol. II, p 643.

Similarly, if the words were to this effect, "this is a *wakf* for my child, and what child may happen to me, and when they fail, upon the poor." And the *Alamgiri* goes on to add, "when a man has made use of these words, though he have no child at the time, the *wakf* is valid; and the produce, when there is any, is to be divided among the poor. If a child should be born to the *wâkif* after the division, the subsequent produce is to be expended on this child so long as he lives; and when there is no surviving child, it is to be expended on the poor."

When a trust is created in favour of one's children (*awlâd*), a right is established only in favour of "children of known paternity" (*nasab*). "Hence if there be a child who is not of known paternity, but whose paternity is known on the word of the appropriator, such child is not included."

"If one should say 'I have settled it on my children, and he has only one child at the time of the produce, half of it will be for that child and half to the poor.' But if the words were 'on my child,' and he has only one, the whole of the *wakf* is for the child. So also when he has had several children but only one is surving."

Reservation of a right of survivorship.

Shaikh Imâm Abû Bakr Mohammed ibn Fazl has declared that when a *wakf* is in favour of two children, upon the death of one of them leaving issue, his share of the profits will be given to the poor until such time as the other son of the *wâkif* also is dead, when the entire *wakf* will be devoted to the benefit of the grandchildren, *unless the wâkif has provided that, upon the death of any one of the immediate beneficiaries, the produce will go to the survivor or to the issue of the deceased.*[1] So also in the *Fatâwa Alamgiri*.[2]

When a person makes a *wakf* of his land for his children (*awlâd*) and destines its ultimate appropriation for the poor, upon the death of each beneficiary the entire produce will go to the survivors, and it is only upon their failure that the benefit of the *wakf* would accrue to the poor. So long as any of the *awlâd* are surviving nothing would be given to the poor.

When a *marîz* (a person labouring under a death-illness) makes a *wakf* of his land in favour of his *walad* and *walad's walad* in perpetuity so long as his *nasl* exists, upon the death of the testator (according to all the jurists), the *wakf* will not be valid in favour

[1] Kâzi Khân.

[2] *Fatâwa Alamgiri*, Vol. II, p 479.

of the heirs, but will be valid, (according to Abû Hanîfa, Abû Yusuf, Zuffer and Hassan,) in favour of the non-heirs, *i.e.*, the grandchildren, in respect of one-third of the estate, "for the *wakf* of a *marîz* is like a will and is valid so far as the third of the estate extends when it is in favour of a non-heir."[1]

"When a person in sickness appropriates his land for his child and his child's child and leaves no other property besides it, one-third of the land becomes appropriated for the benefit of the child's child, whether assented to by the heirs or not, and the other two-thirds form the property of the heirs, if the appropriation is disallowed by them, but if it is allowed by them the two-thirds are to be divided between the child and the child's child equally."[2]

"When a man has made a *wakf* for his son and for his children and for his children's children in perpetuity so long as any one among his descendants is alive, Abu'l Kâsim says the produce will be divided among the *wâkif's* son's children *per capita*, the female and male taking equal shares. And when he was asked regarding the children of daughters, he said they would be entitled, because they are the *awlâd* of his *awlâd*."

The beneficiaries not entitled to partition.

When a *wakf* is made in favour of two or more individuals, they are not entitled to a partition of the property in proportion to their share of the profits. The *mutwalli*, however, has the power to make such arrangements as he deems necessary, consistently with the provisions of the *wâkif* for the due cultivation of the *wakf* lands or occupation of the *wakf* premises.

A *wakf* in favour of heirs during death-illness.

A woman labouring under a death-illness makes a *wakf* for her two daughters and after them for their daughters and daughter's daughters and so on, and on failure of their issue for the purposes of a mosque. She dies leaving her surviving the said two daughters and a sister[3] who does not consent to the *wakf*. In such a case the *wakf* will be valid respecting one-third of her estate and the remaining two-thirds will be divided among the heirs, in proportion to their legal shares. The income of the one-third, which is *wakf*, will also be divided among the heirs in proportion to their shares until the death of the two daughters, when the produce will go exclusively

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[1] *Radd-ul-Muhtâr*, Vol. III, p. 610. [2] *Ibid.*

[3] The sister takes a share with the daughters under the Sunni Law, but not under the Shiah doctrines

to their children. Similarly, if the *wâkif* had said, "I devise by way of *wakf* the produce of this land after fifty years to my children's children," it would be valid. The reason is that, though a testamentary *wakf* in favour of an heir is not valid, it is valid in favour of his or her children, and accordingly when the other heirs do not consent,—the one-third, with reference to which the *wakf* would be valid, if not made to an heir, will be set apart and its produce will be distributed among all the heirs, the immediate beneficiary included, and upon his or her death, the produce of this one-third will be divided among his or her children.

When a *wakf* is created in favour of one's children (*walad*), and on their extinction in favour of the poor it is lawful. Hillâl[1] declares that the children of the children will participate in the benefit of the *wakf* if they be in existence at the time when the produce or income becomes distributable, whether they were or were not in existence at the time of the dedication. This view has been adopted by the jurists of Balkh.[2] Accordingly, when a person declares the *wakf* to be in favour of his children and grandchildren, all of them who happen to be in existence at the time the produce comes into existence or becomes distributable will participate in its benefit.

Yusuf ibn Khâlid Sâmâni is of opinion that the benefit should be restricted only to those children who were in existence at the time of the actual dedication. Further, according to him, a grandchild will not take a share as long as there is a child born before the produce became distributable. If at the time of the distribution there is no child of the *wâkif*, the produce will go to his grandchildren.

A *wakf* in favour of the *wâkif's* progeny valid.

When a *wakf* is constituted in favour of the *wâkif's* child and his *nasl* (progeny), the "*wakf*," says the *Fatâwa Alamgiri*, "is valid, and the males and females of his children and children's children are included; the near and the remote, the children of sons and the children of daughters, the free and slave being all equal, although

[1] Hillâl ibn Yehya ibn Muslim Basri died in the year 456 A. H. He was a disciple of Yusuf ibn Khâlid Basri who himself was a disciple of Abû Hanîfa Some say he received his legal education under Abû Yusuf and Zuffer. He was called Râwi because he followed implicitly the usages of the people of Kûfa. *Radd-ul-Muhtâr*, Vol. III, pp. 676-680.

[2] Whose views are adopted in India.

the shares of the slaves belong to their master. And if he should say, 'I have settled it on my child and my *nasl*,' and he has a grandchild at the time, but a child of his loins is born to him after the *wakf* they both enter into the right. So also if he should say, 'this my land is a *sadakah-moukoofa* on my children in being and on my *nasl*,' a child subsequently born would enter by means of the word *nasl*. If the word were 'on my children in being and their *nasl*,' the children in being and their *nasl* would enter, whether the *nasl* were in being or not, but none of his children who are not in being, nor their *nasl*, would be included. So also if he had said, 'upon my children in being, and their children,' and should there afterwards be born to him a child of his loins, that child would not be included. And if he should say, 'upon my children in being, and on the children of their children, and their *nasl*,' his children in being and their children and the children of their children for ever, while there are any *nasl* or descendants, are included; but if he should say, 'upon my children in being and the children of their children,' and were silent, the child of a child would have nothing."

Again—"When one in good health says, I have made this my land *sadakah-moukoofa* or *wakf* to Almighty God for ever, for my child, and child of my child, and child of their children, and their *nasl* for ever, so long as there are *nasl*,' every child that he had at the time of the *wakf* and every child born to him thereafter before the existence of the produce, and child of the child for ever, enters into the benefit of the produce of this consecration, and if any of them should die before the existence of the produce, the share of the person so dying would fall to the ground; but if the death should not occur till after the existence of the produce, the person dying would have acquired a right to his share, which would pass to his heirs; the higher and lower generations sharing equally, unless it had been said in making the *wakf* that a beginning was to be made with the higher generation, and then the generation below it. In that case, if all of the higher generation but one person should die, the whole would go to that person alone, to the exclusion of the generation below. And if one should say, 'for my child and child of my child for ever so long as there is any *nasl*,' without saying *batnan-baad-batn*, but adding 'as often as one dies his share of the produce is to his child,' the produce would before the death of any of them

be among the whole of the children and children's children and their *nasl* equally, and if one of them should die leaving a child, the share of the person so dying would go to his child, who would thus have his father's share in addition to that appointed for himself by the *wâkif*."

When a dedication is made in favour of "the children and the progeny" (*wulad* and *nasl*) and at the time there is only one grandchild but subsequently a child is born to the *wâkif*, both will participate. Similarly, if a person declare a *wakf* to be in favour of his children, who are in existence and for his *nasl*, children born after the *wakf* will be included as his *nasl*.

When a person makes a *wakf* in favour of his *infant (saghîr)* children, in that case such of his children alone will be entitled to share as were infants at the time of the *wakf*, for though infancy is a quality which ceases, yet it is such a quality which never comes into existence again, and it is therefore tantamount to specifying the children by name.

If a dedication is made for a child and there is born to the appropriator another child, within six months from the date when the produce of the *wakf* came into existence,[1] this latter child will share with the former in such produce. If the child is born over six months, it will not share with the first in the produce as the presumption is, it was not in existence at the time the produce came into existence. If a person make a *wakf* for his child at a time when he has no issue and no child is born to him within six months from the time the produce came into existence, such produce would go to the poor, though subsequent accretions would go to the child.[2]

"When a *wakf* is made for the indigent, upon whom should the produce be spent? Nâtiki has declared that 'if the *wâkif's* children or descendants happen to fall into indigence it should be first applied for them; then upon his relations; then upon his emancipated slaves; then upon his neighbours; then upon the inhabitants of the city where the *wâkif* lived having regard to the nearness and proximity of their residence to where the *wâkif* lived' and children and females will be included in the distribution among neighbours."[3]

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[1] The time when cultivation takes the shape of grain is regarded as the time when the produce is in existence.

[2] Kâzi Khân.

[3] *Fath-ul-Kadîr*, Vol. II, p. 649.

"If a man were to make a *wakf* on so-and-so (naming him) and his children, and he rejects, his rejection does not affect the right of the children whether they be minors or adults."[1]

Section II.

Wakf on the Kindred.

Wakf in favour of the *akriba* or kindred

The term *âl*, *jins* and *ahl-i-bait* of the *wâkif* include those persons who are related to him through the father or the grandfather or any other male ancestor. And *karâbatdâr*, *zu-karâbat*, *arhâm* and *ansâb*, include those people who are related to the deceased through any ancestor male or female. The highest ancestor to which the line would be carried is the person who first adopted Islâm.

Abû Yusuf and Mohammed have said, that by *karâbat* is to be understood every one related to a person through a common ancestor up to the farthest back in Islâm either on the father's or the mother's side, and whether within the prohibited decrees or not, and that the near and the remote are alike in this respect, whether the word be in the singular or the plural. But according to Abû Hanîfa, when the settlement is made in the singular, as for instance, "on my *karâbat* or on a person of my *karâbat*," it is the nearest of the relatives within the prohibited degrees that enters into the benefit of the *wakf*, while if the settlement be in the plural, as for instance, "on persons of my *karâbat* or on my *akriba*" (or relatives), the whole of those above-mentioned are included, as the words are applicable to two or more. With regard to the meaning of the words "most remote ancestor in Islâm," some say that it is the most remote who adopted the Mussulman religion, but others the most remote ancestor since the promulgation of Islâm whether he adopted the faith or not.

If a man say, "this is a *wakf* for my *akriba*, *ahl-i-bait*, &c.," according to the Disciples, even if there be only one of this class the trust will take effect.

Poverty has reference to the time of distribution.

When a man makes a *wakf* for his poor relatives, the poverty has reference to the time when the income becomes distributable. But the recipient of the benefaction must be one who has no

relation legally liable to maintain him or her, for example, a husband, a father, &c.

When a *wakf* is made in favour of one's children or relations, all those who are existing at the time when the produce comes into existence, though born after the creation of the *wakf*, are entitled to share.

What has been said as to a person's *akriba* and *zav'-il-karâbat* is equally applicable to his *arhâm* and *zav'-il-arhâm* and *ansâb* and *zav'-il-ansâb*—all these terms implying the same thing.

When a person has said, "This is a *sadakah* settled on the poor of my kindred or the poor of my children and after them on the indigent," the settlement is valid, and the persons entitled are those of them who are poor at the time when the produce comes into existence, according to Hillâl, whose opinion "we" approve and the *Fatwa* is in accordance with it. Similarly, if instead of "the poor," the words of dedication were "the indigent and the needy of my kindred." If one after making a *wakf* on the needy of his *kindred*, and then on the poor, should die leaving a poor son, Abû Yusuf holds that the son would not come within the meaning of kindred, and this seems correct. When there are poor of an appropriator's kindred in another city than that in which he resides, the produce is not to be sent to them, but is to be divided wholly among those of his own city, though if the superintendent should send any of it away to them he would not be considered as committing a breach of trust.[1]

The meaning of the word *Sâleh*.

A *wakf* to those who are *sâleh* (pious) includes those men who are pure, and nobody doubts them or makes any imputation against them and they follow the path of rectitude, use no evil expressions, are not drunkards and do not revile good women, and are truthful and honest, "these are the *sâleh*, men of purity and goodness."

A *wakf* to the "nearest" among all mankind.

If a man make a *wakf* for "those who are nearest to him among all mankind," and after them for the poor, and he has a child, a father and a mother, or a father or a mother, then the produce will go to the child, though it be a female, for she is nearest to the *wâkif*. And after the child to the poor, and not to the parents, because the *wâkif* did not state, "to the nearest and then to the nearest." If the *wâkif* had no child, but only parents, the produce will go to them

[1] Baillie, p. 587.

equally. If the *wakif* left a mother and brothers, the produce will be given entirely to the mother. If he leaves paternal and maternal grandfathers and brothers, the brothers will take the whole produce.[1]

If the *wâkif* has a daughter's daughter and a son's son's son, the daughter's daughter as the nearest will be entitled to the benefit solely.

But when a man makes a *wakf* on the nearest of his *karâbat*, in that case his parents and children will not share as they are not included in the term *karâbat*.

If a person were to declare, "I make a *wakf* for my *akârib* on condition that the distribution should commence with the one nearest in the *nasab* (consanguinity) or *karâbat* (relationship), and after him for one who is nearest to him and so on," and the *wâkif* has two brothers or two sisters, the distribution would commence with the brothers or the sisters of the full blood and then with those who are uterine. And if one of them is consanguine, and the others uterine, the uterine will take first. This is according to Abû Hanîfa. According to the Disciples they will share equally. A maternal uncle and aunt are preferred to a consanguineous or uterine brother of the father. So a full paternal uncle is preferred to a consanguine or uterine brother or sister of the mother. A full paternal uncle and aunt are preferred to a maternal uncle and aunt. This is according to Abû Hanîfa. According to the Disciples, they

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[1] Some jurists hold the paternal grandfather would take the entire produce, being supposed to stand in the place of the father.

"When a person has made a settlement on the nearest of men to him and after that to the indigent and has a son or a father, he enters into the benefit of the *wakf*, though if his words were 'on the nearest of men among my *karâbat*' they would not enter into it. And if he has a son or a daughter and both parents, the son or daughter alone is entitled and on their death the produce belongs to the indigent and not to the parents; while if he have his parents only, the produce is to them in halves, and if either should die his or her half would pass to the poor In like manner, if he have ten sons and one of them should die his share goes to the indigent. And if he has a mother and brothers or a mother and grandfather, the produce is to her alone to the exclusion of the others, she being the nearer The same is true of the father also. And a father is nearer than a son's son, but a son's son is preferred to a full brother and a daughter's daughter to a son's descendant in a lower grade So also a daughter's daughter's daughter is preferred to a full sister." Baillie, p. 588

take equally. In both these cases the views of the Disciples are adopted as law.

The same rule is applicable to the offspring as to the "roots," bearing in mind that according to the Disciples there is no difference whether they are connected through males or females or through one side or the other, *viz.*, the father's side or the mother's side.[1]

The word *karîb* (near) is not confined to the *karâbat* alone. Therefore, if a man instead of saying "the *wakf* is for one nearest to me among my *karâbat*" were to say "the *wakf* is for one *nearest* to me among all people," this would include both *karâbat* and *ghair karâbat*, and consequently parents and children will be included in the *wakf* though they do not fall in the category of *karâbat*.

If a man were to say, "this *wakf* is for my children, and if any of them should die, his share shall go to one of his degree, the nearer being preferred to the one more remote," and there are the *wâkif's* sister's children and paternal uncle's descendants, the share of the deceased beneficiary would go to the *wâkif's* paternal uncle's descendants and not to the children of the *wâkif's* sisters. This is contrary to the *Fatwa* in the *Khairiyèh* in which the *wâkif's* sister's children are preferred.

A person may create a *wakf* lawfully in favour of his kindred (*karâbatdâr* or *karâbat* or *zû-karâbat*), and no preference will be given to males over females. And in the *Ziâdât* it is stated that the grandparents and grandchildren will participate in the benefit of the trust.[2] A wife, however, is not included in the term *karâbat* or *akriba*.[3]

If a person declare his property to be *wakf* for his *nearest* kindred and he has a consanguine sister and daughter's daughter's daughter, the *wakf* will be in favour of the latter for she is nearest in blood to the *wâkif* being his own descendant, how ever low in decree.

When a *wakf* is in favour of the *poor* kindred, such kindred as are in indigent circumstances will alone be entitled to share in its

Test of indigence according to the *Alamgiri*.

[1] Kâzi Khân.

[2] Kâzi Khân and *Radd-ul-Muhtâr*, Vol. III, p. 681.

[3] See 9 Bombay High Court Reports, p. 19.

benefit. With reference to the question who are indigent and who are not, the *Alamgiri* states the principle in the following terms :— "All persons who are accounted in law as the legitimate recipients of the *zakât* or the poor's rate, must be regarded to be *poor*. A person possessed of only a dwelling-house and a servant is held to be poor, and properly entitled to receive the *zakât*, as well as the benefit of a *wakf* for the poor."

"So also when with this, he has a sufficiency of clothes without anything superfluous or house-furniture, that cannot be dispensed with. But if he have an excess of 200 dirhems above his clothes and furniture, he is to be accounted rich and will not be held entitled either to the *zakât* or to the benefit of a *wakf*. So also if he have two dwelling-houses or two servants and the superfluous house or servant is of the value of 200 dirhems, he is to be accounted rich so as to render it unlawful for him to participate in *zakât* or *wakf*, but not so as to render him liable to the former. And, though the surplus above his dwelling-house, or the surplus above his clothes, or his furniture should not each by itself be of the value of 200 dirhems, yet if all taken together are of that value, he is rich, and cannot lawfully participate either in *zakât* or in *wakf*. And if he have land of the value of 200 dirhems, though the income from it be insufficient for his maintenance still he is rich, according to what is approved. Though he should have plenty of property not immediately available or in debts owing to him by other persons, he may be allowed to take of the *zakât* or the *wakf*, for he is in the condition of a traveller; yet if he can borrow, it is better for him to do so than to receive from a charity."[1]

"Every one who is entitled to maintenance from another, and who may take it without his consent or the order of a Judge, or to whom the Judge may award it out of the property of an absent person,—and every person, the profits of whose property are so mixed up with those of another that neither can be accepted as a witness for the other, is accounted rich in respect of *wakf*, on the strength of the wealth of his maintainor or person with whom he is so connected, and of this parents and children and grandparent are examples. But persons, who though entitled to maintenance

[1] Though apparently there is one opinion of Abû Hanîfa opposed to the view given in the text, which is that held by the Disciples.

from another, yet cannot take it without his consent, or the order of a Judge, and to whom the Judge cannot assign maintenance against another during his absence ; and persons, the profits of whose property are so distinguishable from those of another that each may be accepted as a witness for the other—are not to be accounted rich on the strength of the wealth of their maintainors ; and of this, brothers and sisters and other relations within the prohibited degrees are examples.[1] When a poor woman has a rich husband she is not to *receive* from the *wakf*, but when a poor man has a rich wife he may receive from it."

Kâzi Khân lays down the following rule on the subject, which, however, he says, must vary with the changing circumstances of the times. A person is called *fakîr* (indigent) who has only a lodging (and nothing more,) and he would be entitled to both *zakât* (poor's rate or religious alms) as well as the benefit of a *wakf* (for the poor). Similarly, a person, who has only a lodging, but no wherewithal for subsistence, though he may have an attendant, is a *fakîr*. A person, who has only a few necessary raiments and nothing else, is a *fakîr*. One who has household effects of the value of 200 dirhems will be considered *ghani*, that is, a person enjoying competence. According to Yusuf ibn Khâlid Sâmâni, the possession of 50 dirhems would bring a person within the category of *ghani*. Kâzi Khân.

According to Abû Yusuf, the owner of a piece of land which is worth 200 dirhems, though its income may not be enough for his support, is not indigent ; but Mohammed ibn-Shahna, and Mohammed Ibn Makâtel of Rai would regard him as a *fakîr*. "The words of Abû Yusuf, however, are words of caution, and the saying of Ibn-Shahna contains much elasticity." The author goes on to say, that a person ostensibly possessed of means, though having been overtaken by some calamity, cannot have the immediate use of such property, may be regarded as an indigent. He also adds that a person who, with the exception of a debt owed by an insolvent, owns no other property, will be regarded as an indigent. *Radd-ul-Muhtâr.*

From these statements it would appear that the question, whether a person is or is not an indigent, is dependent upon special circumstances and cannot be answered without reference to the

[1] *Alamgiri*, Vol. II, p 484 ; Baillie, p. 589.

requirements and exigencies of the society among whom the question arises.

When a *wakf* is made for the indigent kindred of the grantor, and one of his kinswomen gives birth to a child within six months of the date upon which the produce of the *wakf* comes into existence, such child will not be entitled to a share in it, for a child *en ventre sa mère* cannot be regarded as coming under the category of indigent kindred. Such child will be treated in the same way as a kindred, who was *ghani* at the time the produce came into existence and became indigent afterwards. This person though not entitled to a share in that produce, will participate in all future income.

When a *wakf* is clearly intended for more than one person comprehended in a class, and there is only one person of that class existing, he will take half of the produce and the remainder will go to the general poor. If, however, it appears *primâ facie* that the whole benefit is intended for persons of that class, independently of their number, such person will take the entire benefit. For example, if a *wakf* is made for the benefit of the indigent among the posterity of *A*, and there is only one such person in existence, the entire income of the *wakf* will go to that person. But if the *wakf* was created for the paupers among the posterity of *A*, and there happens to be only one he takes half of the produce, the remainder goes to the poor in general.

Meaning of the term "orphan"

A *wakf* made for the orphans of one's kindred is subject to the same principles. An orphan or *yeteem* means an infant child who has no father living, though the mother and the grandfather may be alive. The condition of orphanage ceases on the attainment of puberty. In the absence of any indications of puberty, the completion of the 15th year is regarded by Abû Yusuf as the age of majority. Abû Hanîfa holds that the completion of the 19th year is the age of majority for men and the 17th year for women, whilst Zuffer is of opinion that the age of majority should be the same in both cases, namely, the completion of the 18th year.

Age of majority.

If a person make a *wakf* of his property for his poor kindred, will the *mutwalli* be authorized after the *wâkif's* death to give a share of the produce to his indigent grandson? Most of the jurists have answered this question in the affirmative and the Fakih Abu Lais has stated that in the *Ziâdât*, Imâm Mohammed has held the

same view, though apparently Abû Hanîfa and Abû Yusuf have held otherwise.[1]

Where a *wakf* is made for the benefit of the *wâkif's* kindred residing in a particular locality and after them for the poor, would the kindred be deprived of the benefit of such *wakf* if they leave their residence? Fakîh Abû Bakr of Balkh has declared that if the *wâkif's* kindred who are constituted the beneficiaries of the *wakf* are limited in number and capable of being specified, in that case their right to the benefit of the *wakf* is ambulatory and will go with them wherever they go. But if they cannot be specified and are not limited in number, in that case the right of any one of the kindred who leaves the locality will drop and the entire produce will be distributed among those living on the spot, and when none of them are in existence, it will go to the poor. And Abû Lais has stated that should any one of the kindred (so leaving the place), return to that locality, the right would revive.

A *wakf* for the kindred, residing in a particular locality.

Should a *wakf* be made for one's *akriba*, but the words *their descendants* are not added, still they would be included, as the descendants of *akriba* are also *akriba*.

If a person make a *wakf* for his *akriba* and after them for their descendants, these will not share in the benefit of the *wakf* until the first stock is exhausted.

A person makes several dispositions by will and creates a *wakf* of his land for the poor and authorises his executor "to give to whomsoever *he* likes and whatever *he* likes," in such a case it is lawful for the executor of the *wakf* to give to his parents, his wife and kinsmen, if they are poor or in need, and it will, in the main, be regarded as a *wakf* for the poor.

A *wakf* with a discretion to the trustee.

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[1] In the *Alamgiri*, preference is apparently given to the views of Abû Hanîfa and Abû Yusuf :—

"In a *wakf* on '*karîb*' the produce is divided according to heads, the young and the old, the male and the female, the poor and the rich being all alike, because the noun is equally applicable to all. But neither the father of the appropriator nor the children of his loins are included, nor his grandfather, according to the *Zâhir-ur-Rawâyèt*. A man makes a settlement on the needy of his *karâbat* and then dies. Question.—Can the *mutwalli* give any portion of the produce to a son of the appropriator's son when poor? According to Abû Hanîfa and Abû Yusuf he cannot, for the child of a child according to them is not included in the term *karâbat*." There can be no question that the views of Abû Lais are accepted by the sect.

Wakf in favour of neighbours.

When a man has made a *wakf* on his neighbours, the produce ought to be expended, according to analogy, on all who live adjacent to him, but, on a liberal construction, it is for those who assemble together with him and come to the *masjid* or place of worship of the *mahallah* or quarter, and *this is approved*. Residence is the condition, according to the plain doctrine of Abû Hanîfa, whether the resident be proprietor or not, and this also is correct. When the inhabitant is not the proprietor, the benefit of the *wakf* is to the resident and not to the proprietor. The neighbours, whether Moslem or infidel, male or female, free or *mokâtib*, minor or adult, are entitled and the produce is to be divided among them according to the number of heads, the superintendent being responsible if he give more to some than to others. An *umm-ul-walad*, *mudabbar*, or absolute slave has no right to participate, nor a debtor who is imprisoned within the *mahallah* for debt, nor, on a liberal construction, the son, father, grandfather or wife of the appropriator nor the child of a child though he be a neighbour. But his brothers and paternal and maternal uncles do participate.

If, among the appropriator's neighbours, there are some who have gone to another *mahallah*, selling their mansions to other persons who have come into them after the ripening of the crops, but before they are gathered, these are to be regarded as neighbours who are such at the time of the division of the produce. And if a person should make a *wakf* on his neighbours when residing in one house, but should remove to another even though it be a merely rented house, and *reside* therein until his death, the produce will go to his last neighbours. And if a man, after making a *wakf* on his neighbours, should remove to Mecca and die there, the produce would belong to his neighbours in Mecca if he had taken a house there, but if he had gone on a pilgrimage only, it would belong to his neighbours in his own city. If a man have two mansions, in one of which he resides and in the other of which he keeps his merchandise, the produce is for the neighbours of the house in which he lives. If he have two mansions and a wife in each, the neighbours of both are entitled to the produce, though he should die in one of them. So also, though one of the houses be in Basrah and the other in Kûfa, he having a wife in each. And if a person should make a *wakf*

for the poor of neighbours without referring to himself, as, for instance, by omitting to say "my neighbours," it would be the same as if he had said "my neighbours." If a man should fall sick and be removed by his son to another *mahalla* or village and die there, his first neighbours would be entitled, this being no proper removal. But if a woman inhabiting a mansion should make a *wakf* on her neighbours and afterwards marry and be taken to the house of her husband and die there, her neighbours are those of her husband. So also, when a man has married a woman and removes to her house, his neighbours are changed to hers, unless he has left his furniture in his own house, when they say his neighbours are those who were so before his removal.

When it is not known who are a man's neighbours, the produce is not to be divided until witnesses testify to the house in which he died and then a distribution is to be made among the neighbours of that house. And if a neighbour should claim as being poor and the fact of his poverty is not known, he must be put to the trouble of producing witnesses to prove it.

Section III.

Principles of Construction.

When a man makes a *wakf* and constitutes himself *mutwalli* thereof during his lifetime, and declares that after his death his son *A* shall be the *mutwalli*, and after him the fittest and worthiest of his children, the latter "his" refers to *A*, and not to the *wâkif*.

If the *wakf* is for Zaid and Amr and his children, the pronoun "his" refers to Amr.

If a man constitute a *wakf* for his children and *such of his children's children as are male*, the qualification refers to the grandchildren and not to the children.

"*Q.*—A person makes a *wakf* for his son named Hassan and for his children (*awlâd*), that may be born subsequently, and after them for their children that may be male, and after them for his children that may be female and for their children. After the constitution of the *wakf*, another son is born to the *wâkif* whose name is Mohammed, and subsequently Hassan dies. Does the first *his* refer to Hassan or the *wâkif*, so as to include Mohammed in the *wakf*?"

"*A.*—The Hanafî Mufti of Egypt, whose name is Moulâna Shaikh Hassan Sharnibilâlieh, answers the question thus, 'the pronoun 'his' refers to the *wâkif*, and the *Khairiyèh* adds this is most consistent with the intention of the *wâkif*; and it has been decided that when a word is equivocal in its meaning and is capable of a double construction, the construction most consistent with the intention of the settlor should be adopted; for in the case put, if the pronoun is held to refer to Hassan, the *wâkif's* own child will be excluded.'"[1]

"The expression *Inshâ-allah* is a proviso, an *istisna*,"[2] but it is not equivalent to *illa* (unless). According to the Shâfeïs, a proviso refers to the whole document and not to the immediate provision only. According to the Hanafîs, it refers only to the last condition, provided it can be separated from the other conditions, *otherwise to all.* For example, if a man were to say "I make my house *wakf* for my children and my garden for my brothers, but should they go away it shall cease," the proviso refers to the condition regarding the brethren.

But if he had said, "I make this house *wakf* for my children and children's children, but if they go away it will cease to be *wakf*," the proviso would be general. Among the Hanafîs, if a person make the necessity of a qualification a necessary condition to receive the benefits of a *wakf*, the qualification refers to the persons in immediate connection with whom the condition is mentioned. But if it is clear that the qualification refers to all it will have effect given to it generally. For example, if a person make a *wakf* for his indigent children and his children's children, the qualification of indigence is restricted to the children alone. But if he said the *wakf* is for his children's children who are indigent, it refers to both.[3]

According to the Shâfeïs, the qualification would refer to all in any case.

If a person should constitute some portion of his property a *wakf* by way of a pious offering for Abdullah and Zaid, the income will go to these as tenants in common, and when one of them dies, his

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[1] *Radd-ul-Muhtâr*, Vol. III, p. 669.

[2] When the settlor makes use of the expression "Inshâ-Allah," in connection with any provision, it must be regarded as precatory.

[3] *Radd-ul-Muhtâr*, Vol. III, p. 669.

share would go to the poor, and upon the demise of both of them the entire rent and profits would be given in charity. Similarly, when a *wakf* is in favour of a class (*kowm*), the rents and profits will be divided among them, according to their number as tenants in common. And on the death of any one of them his share will be given in charity to the poor. When the appropriation is made in favour of "the child of Abdullah," without mentioning a number, the children of Abdullah will take as joint-tenants, and so long as there is any one of his issue living, nothing is to be given in charity to the poor. When two persons are named, *e.g.*, Zaid and Amr, and it is provided that Zaid should get a half and Amr two-thirds, the whole is to be divided into seven parts, as in the case of the increase (*awl*) in inheritance, of which three are to be given to Zaid and four to Amr. When a settlement is made in the following terms :—"to Zaid a half and to Amr a third," each is to have the portion mentioned for him and the remainder is to be divided equally between them. When the *wâkif* makes the settlement in these words—"My land is a *sadakah* appropriated for Zaid and Amr and to Zaid out of it a third or a hundred dirhems," and is silent as to the other, Zaid shall get what is mentioned for him, "and the remainder is for him of whom nothing has been said." And so in all other cases where one is named and silence is preserved with regard to the other. When the *wâkif* has provided that each of the beneficiaries should get a specific sum, and owing to loss of income, none of them can get the exact amount, the actual income will be divided in proportion to their respective allowances. But, when the income more than covers the allowances, the excess shall be shared by them equally.[1]

When the appropriation is for a class of persons (*kowm*) and they all reject it, the produce is for the poor.[2] But where only some reject it, the whole of the produce shall go to those who do not reject, if the designation under which the settlement is made is generic and the term applies to them all ; but if the name is inapplicable to them, the share of those who reject passes to the poor. Thus when the *wâkif* has said "to the children of Abdullah" and some of them reject, the whole is for those that accept. But if he were to say "to Zaid and Amr," and Zaid rejects, his share passes to the poor.[3]

[1] *Radd-ul-Muhtâr*, Vol. III, p. 670. [2] *Ibid*, p 670. [3] *Ibid*, p. 671.

As already stated, a dedication by a person during his last illness is valid to the extent of one-third of his estate, unless it is assented to by his heirs. When the *wakf* exceeds the one-third and is not assented to by the heirs, it is void as to the excess. If some of the heirs assent to it, it is valid to that extent beyond the third.[1] Accordingly, when a person makes his land "a pious *wakf* to Almighty God, for his child and child's child and his *nasl* for ever, so long as there are any, and after them for the necessitous," and this land falls within a third of his property, its *produce* will be divisible among all his heirs according to their shares in his heritage; and, accordingly, if he leave a wife and children, an eighth will be given to his wife, or if he leave both parents and children, a sixth is to be given to his parents,—the remainder, in either case, being divisible among the children, in the proportion of two shares to a male and one share to a female. This is the case when the *wâkif* has left children of his own and no grandchildren. But when he leaves him surviving both children and grandchildren the other circumstances of the case being the same, the produce is to be divided according to the number of the children and grandchildren, *i.e.*, *per capita*, and the portions of the children in this division are to be divided among them according to the rules of inheritance, and the portions of the grandchildren are to be divided among them equally. And when "the children of the loins" are exhausted, the produce will be divided among the grandchildren and their *nasl*, the widow and parents taking nothing. If the land in question "does not come out" of the third of the *wâkif's* estate, but the *wakf* thereof is assented to by the heirs, it is lawful in respect of the whole property dedicated, and its income will be divided among the children in equal shares (without any preference of the male over the female), to the exclusion of the wife and the parents who will take nothing. But if the heirs do not assent to the dedication, it will take effect with respect to the portion forming one-third of the *wâkif's* estate, and the income will be divisible among all the heirs according to the rules of inheritance; and on the extinction of the appropriator's descendants the produce of that portion will be given to the poor.[2]

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[1] *Surrat-ul-Futâwa*, p. 418 (Mss.).

[2] *Ibid*, p. 416 (Mss); *Futâwa Alamgiri*, Vol. II, p. 480.

When a *wakf* is created during the last illness and legacies are also made, they will have operation given to them out of one-third of the estate.[1]

If one should say "The produce of this my land is to be given after my death to the child of Abdullah and his *nasl*," it is a bequest of the produce. And in like manner, when one has said "Detain it after my death on the child of Abdullah," this expression constitutes a bequest of the produce.

If a man were to make a *wakf* in these terms :—"This land is a *wakf* upon my child, and child of my child, and child of the child of my child," mentioning three generations, the produce is to be expended upon his children for ever, so long as there are any descendants, and is not to be applied to the poor: while one remains the *wakf* is to that one, and the lowest among them, the nearer and more remote being alike, unless the appropriator say in making the *wakf*, "the nearer is nearer," or say, "on my child, then after them on the child of my child," or say, "generation after generation" (*batnan-baad-batn*), when a beginning must be made with them with whom the *wâkif* has begun.[2]

If he should say, "This my land is a pious *wakf* on my children (*awlâd*,)" all generations are included on account of the general character of the name; but the whole is to the first generation while any remain; and when they are exhausted, to the second; and when they are exhausted, to the third and fourth and fifth, all these generations participating in the division, and the nearer, and more remote being alike.[3] If he should say, "I have dedicated it on my children," and he has only one child at the time of the produce, half of it will be for that child and half to the poor. But if the words were "on my child," and he has only one, the whole of the appropriation is for that child. So, also, when he has had several children and they have failed, leaving only one remaining. A man makes a *wakf* of an estate by the words, "a *wakf* on my two children, and when they fail then upon the children of both, and the children of the children of both for ever so long as there are descendants," and one of the children dies leaving a child, half of the produce is to be expended on the surviving child, and half to the poor; but when the second of the children of the appropria-

[1] *Radd-ul-Muhtâr*, Vol. III, p. 671 [2] *Fatâwa Alamgiri*, Vol. II, p. 474. [3] *Ibid.*

tor dies, the whole of the produce is to be expended on the children of the two, and the children of the children of the two. If he should say, "This estate is a pious *wakf* on the needy of my children," and there is only one needy child among them, the half of the produce is to be expended on him and half on the poor.

If a person should say, "This my land is a pious *wakf* on my sons," and he has two or more sons, the produce is to them. If he have but one at the time of the existence of the produce, half of it is to him and the other half to the poor; and if he have sons and daughters, the produce is to them equally, according to Hillâl, and this is correct, and is as if he had said, "My land is settled on my brothers," having brothers and sisters, when all would participate.

If one should make a *wakf* of his estate on his son, and his children, and their children for ever, so long as there are descendants, the produce is to be divided among them, according to the number of heads, males and females being on an equal footing, and the children of daughters being included.[1]

If one should make a *wakf* on his *nasl*, or *zurriut* (both words meaning progeny), the children of his sons and the children of his daughters would be included, whether near or remote. But if the *wakf* were on one *who is related to him (mun yunsiboo)*, the children of daughters would not be included.

A man makes a *wakf* of his land on his children (*awlâd*) with an ulterior destination for the poor, and some of the children die: their shares, according to Hillâl, are to be expended on the survivors, and when they all die, the produce is to be expended on the poor, and not on any child of a child. But if he had settled it on his children, naming them, saying, "upon such an one, and such an one and such an one," with an ulterior destination for the poor, and one of them should happen to die, his share would go to the poor.

In the case of *Saikh Kasimodin* v. *Nawab Mir Sayad Alam Khan*,[2] the Bombay High Court held that the term *ahfâd* being a term of the largest and most general signification, included the descendants of males as well as females.

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[1] *Alamgiri.*

[2] I. L., 10 Bom., p. 119.

When a *wakf* is made in health and the *wâkif* declares that the distribution of the income should be according to the *Farâiz-ullah* among his children, the division would take place among all the beneficiaries, without distinction of sex, in equal proportions.

When a *wakf* is made in favour of consanguine and uterine brothers, they take equally.

When a *wakf* is made in favour of children, the income is to be divided among them equally. This is according to Abû Yusuf, and the *Fatwa* is according to him. A condition in the *wakfnamah* giving to one child a greater interest than the other, or to the sons more than the daughters is sinful, as it is sinful to make any difference in gifts. This is the opinion of all leading jurists. Shaik Nur-ud-din Mukaddasi, Mufti of Cairo, and Shaikh-ul-Islâm Mohammed Tahtâwi, Shâfeï Mufti of Egypt, have given decisions to the same effect, that is, when the *wâkif* makes a *wakf* in favour of a class, all persons belonging to that class take equally, whether they belong to the same sex or not, or whether they differ in their roots, for example, when it is in favour of brothers, consanguine and uterine brothers take together and not according to their shares under the law of succession. Similarly, if a man were to say that in case of his dying without issue, the *wakf* would enure to the benefit of his relatives belonging to the class nearest to him in degree, and he dies leaving only one paternal uncle's son and two paternal uncle's daughters, the male and female cousins take the income in equal shares. The meaning, therefore, of the expression *Farâiz-ullah* is not that the division should be according to their shares under the law of inheritance, but according to the rule laid down by the Prophet in which he declared that no preference should be shown in gifts; and consequently the donees will take equally.[1]

When a man makes a *wakf for the sons of A, excepting the sons residing abroad*, and then some of the sons leave the city or country, they lose the right and do not recover it on their return to the country. Similarly, if a *wakf* is made for the children of *A*, engaged in the pursuit of learning, and some of them give up their studies, they lose all interest in the *wakf* and do not recover it on

[1] *Radd-ul-Muhtâr*, Vol. III, p. 672.

resuming their studies, unless in all these cases the *wâkif* has declared that they would get back their interest on their return.

A person claiming an interest in a *wakf* created for the poor relatives of the *wâkif*, on the ground that he (the claimant) is a poor relation, is bound to prove his right, *first*, that he is a *karâbatdâr*, and *secondly*, that he is poor. He cannot subject the *mutwalli* to affirmation.[1]

The principle, upon which persons who leave a certain locality are precluded from participating in the benefit of a *wakf*, does not apply to a case like the following :—"A man makes a *wakf* for his poor relations residing at Bagdad, and some of them go and live at Kûfa and after a while they come back to Bagdad, [on their return] they regain their right to share in the benefits of the *wakf*." The reason of this is that their condition should be regarded at the moment when the distribution takes place, as their poverty forms the basis of their claim and the object of the *wâkif* is to help his poor relatives.

When a man makes a *wakf* for his descendants, and after the *mutwalli* has been dividing the produce among certain of his descendants, another person establishes his right also to a share as one of the descendants of the *wâkif*, he will be entitled to recover the past share if the *mutwalli* has divided the shares without the sanction of the Kâzi. The *mutwalli's* position in such a case is like that of an executor who, after paying some of the creditors, divides the remainder of the testator's estate among the poor, and subsequently thereto arises another creditor who establishes his claim, he is entitled to proceed against the executor for the satisfaction of his debt.

When a man makes a *wakf* in favour of his *sons* or his *children*, and there is only one child, he or she will take one half and the remainder will go to the poor, but if he were to say it was for his *son* or *child*, the entire produce will go to the one child.

In connection with this subject, however, it must be remembered that "the object of the *wakf* depends on custom (*urf*), and if a person were to make a *wakf* for his children, and his children's children with the intention that whosoever among them may be

[1] A wife is not included in the term *akriba* ; *Advocate-General* v. *Fatima Begum*, 9 Bom. Reports, p. 17.

surviving should take the whole of the produce, the entire produce will go to his descendants, though there be only one."[1]

When a settlement is made by a person in favour of the people of his *bait* or house, every one is entitled who is connected with him by ancestry "to the most remote of them in Islâm," without distinction of creed or sex, or the nature of the relationship. "The Moslem and non-Moslem, the male and female, the prohibited and the unprohibited, the near and the remote, are all alike in this respect. The remotest ancestor, however, is not included. But the child and parent of the appropriator are included, though not the children of his daughters and sisters, nor the children of any other females besides these, except when married to paternal nephews of the appropriator." As-Sarakhsi has stated in his commentary on the *Siyar Kabîr*, that the words "people of the house" when they occur in deeds of *wakf* or wills are to be construed according to the intention of the testator. If by "house" he intended his residence, "the people of his house" should be taken as meaning those who reside in family with him and are maintained by him, though there may not be any of his *karâbat* or kindred among them; and if by "house" he meant *nasab*, then the people of his house are all the recognised children of his father. Imâm Ali as-Sugdi, however, maintains that if the person have a house of *nasab* like the Arabs, the words "people of his house" would mean the descendants of his ancestors, (lit., the children of his fathers,) though they should not be residing in family with him; "but if he have no house of *nasab*, they are those living in family with him and maintained by him and none others, though they should be of his kindred, and this is approved." When a settlement is made on the "people of the house," "those in existence are included, and those who may come after them, of their children and children's children."[2]

When a person uses the expression *âl* or *jins*, it is in effect the same as "on the people of my house," and there is no speciality in favour of the poor, unless the *wakf* is made specially for them. The phrase "on the poor of them" is like "on those who become poor," and consequently, "the produce is for him who is poor at

[1] *Radd-ul-Muhtâr*, Vol. III, p. 672. [2] *Alamgiri*, Vol. II, p 190.

the time, though he were rich when the settlement was made and it is not restricted to those who were rich and have become poor." If a woman should make a settlement "on the *ahl* (people) of her house" or "on her *jins*," her mother and her child would not be included."[1]

If a man should say "on the *ahl* of Abdullah," it would be for his wife specially, according to Abû Hanîfa. Hillâl, however, has said, "We think it better to make it include all free persons of his family living together with him in his house;" *and this is approved.* But slaves are not included, nor Abdullah himself nor persons of his family living in another house.

Ayâl comprehends every one maintained by a person whether living in his house or not, and *hasham* is synonymous with *ayâl*. By *akb* are to be understood all those who are connected with a person through his father, and the children of daughters are not included except females whose husbands are among these. And if one should make a settlement on Zaid and his *akb*, Zaid himself being alive and having children, these would have nothing, for the child of a man cannot be called his *akb* except after his death.[2]

Application of a *wakf* in favour of the indigent.

The following rules are laid down in the *Alamgiri* relating to the distribution of the income of a *wakf* for the poor kindred:—

1. It is to be expended in the first place on the poor of his children and his kindred and the surplus only given to strangers.

2. Poverty on the day of the produce coming into existence is not to be regarded but rather poverty on the day of distribution.

Beginning must be with *wâkif's* descendants and kindred.

3. The nearest in kindred are first to be supplied, and then the more remote, that is, the child of the loins has priority, and after him the child of a child, then the third generation, and then the fourth

[1] The *dictum* in the *Alamgiri* that "when a woman makes a settlement on the *ahl* (people) of her house or "on her *jins*," her mother and her child would not be included, is explained further on.

[2] *Alamgiri.* (1) *Karâbat* literally means relationship, but is often used to imply related.

(2) *Karâbatdâr* and *zu-karâbat* mean one who is related.

(3) *Zavi*, plural of *zu*.

(4) *Akriba*, plural of *karib*, next of the kin, people nearly related.

(5) *Arhâm*, plural of *rahm*, womb; technically means uterine relations.

(6) *Faktr* and *miskîn*, both words are applicable to indigent people, but a *faktr* may be possessed of some property, the whole of which must not amount to more than a *nisab*, a *miskîn* has no property or habitation. *Hed.*, Vol. I, p 54.

and a lower generation. If none of these remain, or there is a surplus after satisfying them, it is to be bestowed on the more remote of the poor kindred beginning, here also, with the nearest among them. 4. That to each person to whom a portion is given something less than 200 dirhems be given, that is, when the *wakf* is for the poor generally and some of the kindred are in need. But if the *wakf* be for the poor of a person's kindred, the whole produce is to be distributed among them, though the share of each should exceed 200 dirhems.

When an appropriator has appointed the produce for debtors or travellers or in the way of God, as for pilgrimage, and some of his children or kindred fall into want, no part of it is to be given to them, unless the child or the relative be a debtor or a traveller, &c., when also a beginning is to be made with them.

A death-bed *wakf* in favour of descendants.

When a *wakf* is made by a man on his death-bed in favour of his own child, and the child of his child, and their posterity (*nasl*), the *wakf* in favour of his own children is not valid (they being his heirs), but it is valid as regards the grandchildren. So long as there is a child of the *wâkif* living, the produce is to be divided *per capita* among the children and the grandchildren. The shares falling to the lot of the children being, however, given to all the *heirs* of the *wâkif*, so that if besides children there is any other heir of the *wâkif*, he or she would participate in the children's share. For example, the *wâkif* leaves four sons, two grandsons, and a wife, and the income from the *wakf* is 600 dirhems, it will be divided "according to the number of heads." The children's share will be 400 dirhems. This sum will be divided among all the *wâkif's* heirs, including the widow. It must be remembered that the grandchildren are not heirs. Should some of the children of the *wâkif* die, the income will be divided among the surviving children and grandchildren *per capita*, and the shares of the surviving children will be given to all the surviving heirs of the *wâkif* and to the heirs of those heirs of the *wâkif* who were alive at the time of his death.

Testamentary *wakf*.

Similarly, if a *wakf* is made by a person to take effect after his death in favour of his children, children's children and their *nasl*, the *wakf* in favour of the children will not be valid, they being heirs, but will be valid in respect of the others. The division will be as in the case of a death-bed *wakf*.

In these cases the *wakf* does not take effect in favour of the children in consequence of its being made either in death-illness or as a testamentary disposition. But where the *wakf* is made "in health," as a disposition *inter vivos*, it takes effect in favour of the children, as stated before.

When a man makes a *wakf* on some of his children, and mentions that the *wakf* should be during his life and after his death, the words, "after his death" does not, according to the most authentic report, constitute a legacy to an heir, but bears the construction of a perpetuity.[1]

When a *wakf* is made in favour of Zaid and his children and after them in favour of the poor, and Zaid were to declare that the *wakf* was in favour of Amr and the poor, his declaration would not affect the interests of the children or the poor. But the rents and profits will be divided equally among Zaid and the children in existence at the time, and half of Zaid's share would be given to Amr.

If Amr died before Zaid, his share would be given during the lifetime of Zaid to the poor. Should Zaid die before Amr, his interest in the profits would cease.

If the *wakf* is for Zaid and the poor, and Zaid makes a declaration in favour of Amr instead of himself, in that case the rents and profits will be divided equally between Zaid and Amr, and when Zaid dies, the entire rents and profits will go to the poor. If Amr dies during the lifetime of Zaid, half of Zaid's share will be given to the poor. For when Zaid has declared himself entitled only to a moiety and Amr to the remaining moiety, in that case Amr's half only goes to the poor.[2]

When a *wakf* is in favour of *A* and his descendants, on the extinction of *A's* posterity the *wakf* will be for the poor as already stated, whether they are expressly named or not. If *A* refuses to take any benefit under the *wakf*, the produce will be given to his children existing at the time. If he has no children, the *wakf* will be applied in relieving the needy. If afterwards any child is born to *A*, the profits will be given to such child.[3]

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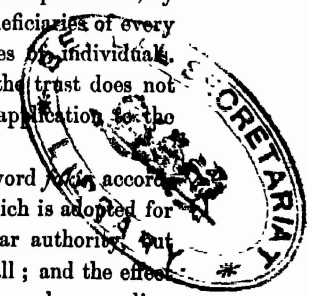
[1] *Alamgiri*, Vol II, pp 474-475 [2] *Radd ul Muhtâr*, Vol. III, p 669
[3] *Ibid*

If *A* as well as his children existing at the time, refuse to take any benefit under the *wakf*, it will go to the poor ; but their rejection does not bind the succeeding generations.

If a *wakf* is in favour of *A* and after him for *B*, and they both reject, it will go to the poor absolutely.[1]

As a general rule, it may shortly be stated that the poor form, by necessary implication of the law, the ultimate beneficiaries of every trust created in favour of individuals or classes of individuals. The failure of the primary object or objects of the trust does not void the trust, but only accelerates its ultimate application to the poor.



I have already explained the meaning of the word *faqir* according to the various authorities. The definition which is adopted for the *Fatwa* is one not derived from any particular authority, but generally from a comparison of the meaning of all ; and the effect is, as stated in the *Anfaa-ul-Wasâil*, that any person who according to the exigencies of the society in which he lives is in poor and needy circumstances, or has not the wherewithal to support himself and his family for more than a few days, is indigent. Kâzi Khân puts it tersely, that a person entitled to the *zakât* (obligatory alms) is also entitled to the benefits of a *wakf* for the poor.

A *wakf* created for the purpose of relieving the needs of the *wâkif's* descendants, &c., when they fall into indigence, is lawful.[2]

A *wakf* generally for the poor or for the indigent or for the relief of those of the *wâkif's* kindred or descendants who fall into want, will be applied in providing them with food and raiment ; and if homeless, in housing them.

If there are no provisions in the *wakfnamah*, the Kâzi or Judge has absolute discretion to frame a scheme for the carrying out the purposes of the trust.[3]

When a *wakf* is made for an undefined number of people, such as for the poor generally, Mohammed says, at least, 10 must be fed or supported ; according to Imâm Abû Yusuf, 100 ; others, again, have held that the number oughtt o be 40 or 80. But the *Fatwa* is that the fixing of the number should be left to the Hâkim with due regard to the circumstances of the *wakf*.

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[1] *Radd-ul-Muthâr*, Vol. III, p. 670. [2] *Ibid*. [3] *Kiniat-ul-Munia*.

CHAPTER X.

PUBLIC AND QUASI-PUBLIC WAKFS.

SECTION I.

GENERAL OBSERVATIONS.

AMONG *wakfs* in which the affluent (*aghniâ*) and indigent (*fakarâ*) are equally interested may be mentioned the following :—

(1) Mosques and prayer-grounds (*musallas*).

(2) *Imâmbaras.*

(3) *Rouzahs* (mausolea) and *dargâhs.*

(4) *Khânkâhs.*

(5) *Caravanserais* and *musâffir-khânèhs* (travellers' houses).

(6) Colleges and schools (*madrassas* and *maktabs*).

(7) Hospitals and dispensaries.

(8) Reservoirs, cisterns, aqueducts, roads, bridges, &c.

(9) *Rubats* or hostels and rest-houses.

(10) Cemeteries.[1]

In these *wakfs*, the rich and the poor, the affluent and the indigent, are equally entitled to participate. But the *wâkif* may specially consecrate such institutions or places for the poor, in which case these alone would be entitled to derive benefit therefrom. For example, a school may be dedicated for the education of the children of the poor, or a hospital for the relief of the sick and ailing among them, and so on.[2]

In the case of *lungar-khânèhs*[3] and similar institutions which are primarily intended for the poor, the affluent have, *primâ facie*, no title to benefit therefrom. But the *wâkif* may condition otherwise.

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[1] This is by no means exhaustive.

[2] A burial-ground for the poor or homeless strangers is called *gûr-i-gharibân.*

[3] A place where doles of food are distributed to the poor.

Mosques are too well-known to require any detailed description. The word *masjid* is derived from *sijda*, devotion, and means a place of devotion or a place where prayers are offered to the Almighty.

A very fair description of an ordinary mosque is given by Herklot in his *Qanoon-i-Islâm*. *Musallas* are prayer-grounds, and the word is derived from the word *salât* or prayers. In India, they are generally called *Idgâhs* or *namâz-gâhs*, and consist of a plot of ground set apart for the performance of the daily prayers or the Id prayers.

An *Imâmbara* literally means the house of the *Imâm*. It is a building consecrated to services held in honour of the martyrdom of Hussain, and is generally a Shiah institution, though many Sunnis also erect and maintan *Imâmbaras*. In Persia, an *Imâmbara* is generally called an *Imâmzada* or *mash-had*.

In India, the tombs of saints or holy personages are generally called *dargâhs*. In Persia and Western Asia they are called *rouzahs*, like the *rouzah* of the Caliph Ali, that of Imâm Ali ibn Mûsa ar-Raza at Meshed, and so on.

A *Khânkâh*, sometimes also called *Khangâh*, is defined by Richardson to mean a monastery or religious structure built for the Eastern Sûfis or dervishes.

Meninski defines the word thus, "*domus propter Deum extructa in usum sophorum aut religiosorum, cœnobium.*"

In the *Burhân-i-Kâtè* and the *Majâlis-ul-Aârifin* it is defined as a place where *dervishes* and other seekers after truth congregate for religious instruction and devotional exercises.

It is, ordinarily speaking, an institution for the lodgment of religious devotees, travellers and mendicants.

In Western Asia, they are sometimes called *rubats* and are used generally for housing pilgrims, dervishes, &c.

In India, *Khânkâhs* have generally sprung up in the following way :—A *dervish* or a person who, by leading a pious life, has won the esteem and veneration of the neighbourhood, or a *Sûfi* of particular sanctity has settled down in some locality. So long as he has not attained sufficient importance, his place of abode is called a *takia*. But when he is a man of importance or has attained sufficient eminence, it is designated an *âstâna*. His pious life and religious ministrations attract public notice, disciples gather round him, and a place is constructed for their lodgment. And the humble

takia grows into a *Khânkâh*. After the death of the holy personage, the spot where he is buried becomes a shrine and an object of pilgrimage not only for his disciples, but for people of distant parts, both Mahommedans and Hindoos, and is designated either as a *dargâh* or *âstâna* or *rouzah*.

The tomb of the famous poet Shaikh Ali Hazîn is regarded as a shrine. And grants have been made by pious chiefs and sovereigns to these holy men for their maintenance and the maintenance of their descendants in perpetuity and the performance of pious acts. Such are the shrine and *Khânkâh* of Shah Kubeer Dervish, to which I shall refer again later.

There are a number of *dargâhs* in India. Some of the most noted ones in Southern India are mentioned by Herklot.[1] Of the others, the most important are those at Ajmîr[2] and at Futtehpur Sikri (near Agra). There is a celebrated *dargâh* in the suburbs of Calcutta called *Moula Ali Ki Dargâh*, where votive offerings of all kinds are made, not only by Mahommedans but Hindoos also.

Rest-houses for *ghâzis* or soldiers engaged in holy warfare are also called *rubats*.

Section II.

Mosques and Musallas.

"The proprietary right of the *wâkif* in a building or ground set apart for prayers becomes extinguished either on the declaration of the *wâkif* that he has constituted it a mosque or *musalla* or consecrated it for worship, *or* on the performance of prayers therein or thereon."[3]

Every ground set apart for prayers is not necessarily a *musalla* and subject to the rules governing a mosque. A *musalla* is a place where funeral prayers or the prayers of the two Ids are usually offered. In such cases only the place where the congregation gather and the worship is performed that is governed by the rules governing a mosque. But a piece of ground may be specially dedicated for the performance of public prayers, and though there

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[1] Herklot's *Quanoon-i-Islâm*. [2] The mausolea of Muin-ud-dîn Chishti.
[3] *Radd ul-Muhtâr*, Vol. III, p. 571.

is no building thereon, if prayers have been habitually performed thereon, it is *wakf* and subject to the rules governing a mosque.[1]

According to the *Multeka*, the performance of prayers is equivalent to consignment. But in the *Zakhîra* it is stated that the prayers must be congregational, *Salât-bil-jamâat*, which is unanimously regarded as tantamount to delivery. So that when a person erects a building with the object of dedicating it as a mosque, and permits people to offer prayers therein, without declaring that he has constituted it into a mosque, and prayers are offered there *bil-jamâat*, the mosque becomes irrevocably dedicated.

"When a mosque is erected or set up inside a dwelling-house or residence (*dâr*), and permission is granted to the public to come and pray, and a pathway is also made or set apart for their egress and ingress, the dedication is good by general consensus. If a pathway is not indicated, in that case, according to Abû Hanîfa, the dedication is not sufficient. But according to Abû Yusuf and Mohammed, it is good, and the pathway will be implied by the permission to pray, and *this is correct*."

The public do not acquire any right in a private mosque without special permission.

Accordingly, if a man were to build a mosque inside his house, it will not become a public mosque, subject to the rules governing a *public* religious institution, unless permission has been once granted to outsiders to come and pray. It is not necessary that such permission should be given in express terms, but, without an actual or constructive permission, a mosque created within a private building will not become a public mosque so as to entitle the public, or any section of the public, to claim the use of it. At the same time, though the public may have no right in a private mosque, it may constitute a good *wakf* so as to exclude the rights of the heirs over it. Where prayers have been once offered, it is not necessary to prove an express dedication. The very fact of the prayers being offered in it will imply a valid and good dedication.

According to Abû Yusuf, the *kawl* alone of the *wâkif*, or a declaration on his part that the land or premises is dedicated, is sufficient:—For example, if he declare that a particular building is constituted into a mosque, it would be a valid dedication, even though prayers may not have been offered in it. "This is the

[1] *Sharh Multeka*

accepted doctrine" says the author of the *Radd-ul-Muhtâr* "as stated in the *Durr-ul-Munteka*, the *Durrar*, the *Vikayah* and other authorities, and we decide according to it."[1]

When the structure does not bear the shape of a mosque, or when there is no evidence of a declaration on the part of the *wâkif* that he has constituted the building into a *masjid*, and the evidence of dedication depends on the performance of prayers within it, some lawyers have held such prayers should be with *azân*[2] and *ikâmat*.[3] The reason of this condition is stated in the following terms :—"As delivery of possession in the case of a *wakf* is deemed necessary, though Abû Yusuf holds a contrary opinion, the nature of the delivery depends in each case upon the nature of the specific thing, for example, the delivery of a cemetery is by the burial of *one* person ; of a tank or reservoir by *one* person drinking there ; of a guest-house (*musâffir-khânèh*, traveller's house) by *one* way-farer or traveller alighting there. Similarly, as the purpose of a mosque is that people should pray there in *jamâat*,[4] it is required that where there is no express dedication, prayers should have been offered there with the *azân* and *ikâmat*."

Prayers offered once in a mosque constitute a valid dedication.

But when one man acts both as *muezzin*[5] and *imâm*[6] his praying alone is sufficient.

If prayers are offered *once* in a mosque it is sufficient to constitute a good dedication. But should the *wâkif* alone pray in it, that would not be sufficient unless there is a declaration.

According to Kâzi Khân, "the delivery of possession as regards a *masjid* is complete when only one person has prayed in it with *azân* and *ikâmat*. The view universally adopted is that prayers offered by one person in a mosque is sufficient to constitute it a public mosque devoted to the worship of God, for a mosque belongs to the Deity and there affixes to it a right of the Mussulmans in general, and one person can be a proxy for the establishment of the right of the Creator and the public. According to Abû Yusuf, consignment is not necessary for the validity of any dedication, whether it be a mosque or any other *wakf*.

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[1] *Radd-ul Muhtâr*, Vol III, p. 572.
[2] The call to prayers
[3] The summons to prayers
[4] In assemblies.
[5] The person who calls to prayers.
[6] One who leads the prayers.

Therefore, if a person create a mosque and give permission to people to pray therein, it is an absolute *wakf*, and *this opinion we adopt*." [1]

Should a mosque be consigned to a *mutwalli* but no prayers be offered therein, it would be a valid dedication.

When a person has erected a public reservoir, fountain or cemetery according to Abû Yusuf, "whose opinion we follow," the *wakf* cannot be revoked. The burial of even one man in a cemetery is sufficient to constitute it a *wakf*, so the staying of one *musâffir in a musâffir-khânèh* makes the *wakf* irrevocable. [2]

The general result of the above principles may be summed up in the following terms :—Where effect has been once given to a dedication in the mode which is natural to the particular dedication, the *wakf* is complete and irrevocable. For example, the special purpose of a mosque is that people should perform their devotions there ; of a cemetery, for dead persons to be buried there ; of a reservoir or tank, to supply water to those who use it, &c., so according to the accepted doctrine of Abû Yusuf, even where there is no evidence of an express dedication in words, if it appears that one single individual (other than the grantor) has offered his prayers at the place, or one single person has been buried in the cemetery, or one person has drunk at the fountain, the dedication for the specific purpose must be regarded as complete. Such use of the subject of the *wakf* being in conformity with its avowed or ostensible object should be considered as conclusive of the dedication.

"A person has a piece of land and permits people to pray thereon without any restriction or limitation as to the time of prayer or the number of people who should pray there. After his death that land will not form a portion of his inheritance. But if the permission was limited to a particular occasion or to a fixed period of time, the land will continue to be his inheritable property, for the limitation of time or occasion rebuts the presumption of absolute *wakf*." [3]

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[1] Kâzi Khân.

[2] *Radd-ul-Muhtâr*, Vol. III, p. 572.

[3] *Ibid*, p. 571.

A place where the *namâz-îd*[1] or *namâz-i-janâza*[2] is usually performed is subject to the rules of a *masjid* according to Kâzi Khân and the Sâhib-i-Asaâf.[3]

If a person were to say "this room of mine I have set apart for supplying oil to the lamps of a certain mosque," and add nothing further—then, according to Fakîh Abû Jaafar, the room becomes *wakf* for the mosque in question, if it is made over to the *mutwalli*, and the *Fatwa* is according to this opinion.[4]

If a person make a *wakf* of his land to a mosque and consign it to the *mutwalli* of the mosque, it is lawful and cannot be revoked. If a person were to bestow money for building a mosque or for the "affairs" of or the support of the mosque, it is valid upon delivery.

If a person make a *sadakah* of his house for a mosque or for the benefit of Mussulmans, it is lawful, and the *Fatwa* is according to this.

A *wakf* for the repairs of mosques and graves is lawful, for it implies perpetuity.

A sovereign cannot give any portion of the land acquired by treaty and negotiation to be converted into a mosque without the consent of the owners, but he can give any portion of the land acquired by war, provided it does not interfere with the rights of way possessed by any individual.

If a person erect a mosque but appoint nobody as the *mutwalli* thereof, the *towliat* or governance remains vested in him. This is according to Hillâl and Nâtiki.

The *Ahl-i-mahalla*, *i.e.*, the people of the quarter may lawfully enlarge or reconstruct a mosque and supply it with better articles at their own expense, but not at the expense of the mosque unless the Kâzi's permission is obtained to that effect. Should the *Ahl-i-mahalla* wish to improve the mosque, with or without the consent of the Kâzi, the heirs of the appropriator will not have any right to object unless it is patently contrary to the wishes of the *wâkif*.

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[1] Prayers offered on the occasion of the two Id festivals, being after the *Id-ul-fitr* and the *Id-ul-uzha* or *Bairam*.

[2] Funeral prayers.

[3] *Radd-ul-Muhtâr*, Vol III, p. 572

[4] *Ibid*, p 572 ; *Surrat-ul-Fatâwa*.

Frequently, rooms are reserved in private residences for family prayers, or for the performance of the Moharram ceremonies. Rooms thus set apart cannot be regarded as specifically consecrated so as to constitute a *wakf* and to exclude from the rooms in question the rights of the heirs. In many cases, however, distinct apartments are set apart for the performance of the religious ceremonies, like Kerbelai Mohammed's Imâmbara in Calcutta. Often, they have an entrance separate from that of the private residence, and in all respects fulfil the condition laid down by Kahastâni, who declared that, where the mosque was so intermixed with the private property or residence of the *wâkif* as to render differentiation necessary, the *wakf* premises should be distinctly indicated. In these cases, there can be no question as to the apartments constituting a valid *wakf*. As a matter of principle, however, the law disfavours the dedication by way of *wakf* of one portion of a private residence, whilst the other portion is in the occupation of the *wâkif*. For example, the dedication of the upper or lower storey of a building as a mosque is not considered valid, unless, owing to the crowded condition of the locality, it has become customary to constitute such mosques. Both Abû Yusuf and Mohammed recognised the lawfulness of such dedications in Bagdad and Rai, on account of the dense population in those cities in that century. It must not be inferred from the above, that there is any bar to the temporary conversion, or use, by any person, of a portion of his private residence as a place for family prayers or religious worship. The rule is, that unless certain conditions are complied with, the apartments will not be subject to the law of *wakf* and will continue to form the private property of the individual, the one chiefly requiring attention being that the portion dedicated is capable of being differentiated from the rest of the residence; when such can be done, the *wakf* is valid.

But where the whole building is constituted *wakf* for a mosque, imâmbara or madrassa, and a portion of the building is used for the specific purpose of the *wakf*, and the remainder for the use of the servitors of the institution, or for letting out to people as a source of income to the *wakf*, the dedication is valid. The mere fact of the *wâkif* occupying some portion of the building as *mutwalli* will not affect the validity of the *wakf*.

In the *Hedâya* it is stated that Abû Yusuf and Mohammed have held the dedication of the central hall of a house for the purpose of

a mosque to be valid. The *Radd-ul-Muhtâr* doubts the correctness of the report.

It is usual always to build mosques or mausoleums so as to be able to let the ground-floor or the outer portions to shopkeepers, the rent being applied for the maintenance of the institution. In fact, in many instances, such shops form the only endowment attached to the mosque or mausoleum. The existence of these secular buildings does not affect, as has been sometimes supposed, the validity of the *wakf* or the nature of the religious structure.

When any portion of the building is allotted for the residence of the servitors, such servitors have no right to let their rooms to others. They can reside in such rooms so long as they are in the service of the mosque; but they cannot allow another person to reside in those rooms for hire or otherwise without the permission of the *mutwalli*. If the service is hereditary, their successors have the same right and no more. The *Radd-ul-Muhtâr* says that "as the servitors of a mosque or *madrassa* cannot assign their allowances to others, so they cannot assign their rooms."

A mosque does not belong to any particular sect. It is open to all Mussalmans to go in and offer their adoration to the Almighty. Suppose a Hanafî erects a mosque; the Shâfeïs, the Mâlikis and the Hanbalis may pray there equally with the members of the Hanafî sect. Nor is there any objection to a Shiah going and praying there according to his own ritual. The Hanafî *mutwalli* cannot prevent any person, so long as he is the worshipper of God, from coming and offering his adoration to the Almighty. The Hanafî can pray behind a Shâfeï, Mâliki or Hanbali imâm and *vice versâ*.

According to the *Alamgiri*, "the *imâmate* (leadership in prayers) of freethinkers and heretics is valid."[1] The same principle is laid down in the *Radd-ul-Muhtâr*.[2] But the *Alamgiri* adds that "it is not lawful to offer prayers behind a *mushhabbaha* (one who believes God to be like a man, in other words, an anthropomorphist) a Jahmi,[3] or a Râfizi."[4] In short, freethought *(hawa)* which does

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[1] *Fatâwa Alamgiri*, Vol. I, p. 116.

[2] *Radd-ul-Muhtâr*, Vol I, pp 585-586.

[3] A follower of Jahm ibn-Safwân, who denied all free will.

[4] A follower of Râwendi and Mokanna

not amount to *kufr* (denial of the unity of God and the messengorship of the Prophet) does not disqualify one from *imâmate*, "and it is lawful to pray behind a freethinker . . . . . so it is stated in the *Khulâsa*, and that is correct, and the *Badâya* says the same."[1]

There is no prohibition therefore to a Sunni praying behind a Shiah and *vice versâ*, but practice does not recognise it; and among the Shiahs some of the legists have gone so far as to declare praying behind a Sunni illegal. Nor is this exclusiveness confined to some Shiah legists, for *ultra*-Sunnis hold a similar opinion regarding a Shiah officiating at their prayers. In spite of the barrier created by bigotry between the two sects, it is frequent for a Shiah to go into a mosque dedicated by a Sunni, or a Sunni to go into a mosque where Shiahs usually pray, and perform his prayers according to his own ritual, even when the Sunnis or the Shiahs, as the case may be, are engaged in their prayers. There is nothing illegal in his so doing, nor can the *mutwalli* of the mosque turn him out so long as he does not interrupt the worship of the others.

According to the Hanafîs and the Shiahs, the prayers of the congregation are not commendable unless the imâm (the person who leads the prayers) is well-conducted and leads a pure life. According to the Shâfeis, Mâlikis and Hanbalis, the imâm's conduct has no effect upon the prayers of the congregation.

But though some members of one sect may go and pray in a mosque whilst members of another sect are engaged in their devotions, there cannot be two *azâns* (calls to prayer) and two *jamâats* (assemblies) at one and the same time in that mosque.

The Sunnis offer their prayers with the hands folded in front; whilst the Shiahs perform their devotions with their hands held straight down by their side. Both practices are based upon certain traditions accepted by one sect and objected to by the other.

The Shâfeis, Mâlikis and Hanbalis raise their hands when pronouncing the *takbîr* (*viz.*, the words "*allaho-akbar*, God is great," during a certain part of the prayers. This gesture is called *rafaa-eddain*, 'raising of the hands.' They also pronounce loudly the

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[1] *Fatâua Alamgiri*, Vol. I p 116.

word *âmîn* or amen after the first chapter of the Koran has been recited by the Imâm, which is not regarded as correct by the Hanafîs. This practice is called *amîn-bil-jahr*.

The Hanafîs regard both these practices as irregular. They pronounce the word *âmîn* softly, and raise their hands during the *takbir* not higher than above the ears.

These small differences in ritual have given rise to considerable disputes in this country. A large section of the Sunnis in India have, chiefly on doctrinal matters, become non-conformists or *ghair-mukallids* (from *taklîd*, conformity). They profess to follow no particular Imâm, but to act according to all four. They incline, however, towards Shafeïsm, and call themselves *Aâmil-bil-Hadîs*, "followers of the traditions." In practice, they adopt *rafa-ed-dainisim* and *âmîn-bil-jahr*. The ignorant Hanafîs object to these innovations, and hence the disputes. They refuse to pray after an *aâmil-bil-hadîs* Imâm, or to allow the *aâmil-bil-hadîs* to offer prayers in a mosque, usually used by Hanafîs. Both these points have been settled in favour of the *aâmil-bil-hadîs*.

In the case of *Moula Bukhsh* v. *Omed Ali* their Lordships of the Privy Council have decided that an imâm does not become disqualified from leading at prayers owing to his having adopted the *aâmil-bil-hadîs* doctrines.

The *aâmil-bil-hadîs* support their practice by a reference to certain *hadîses* given in the *Sahîh-i-Bokhari* and *Sahîh-i-Muslim*.[1]

Colleges, schools, hospitals, dispensaries, &c., stand on the same footing as mosques and other religious institutions. From an English point of view, they would be regarded, generally speaking as secular endowments. But, in the Mahommedan Law, there is no distinction between purely religious institutions and others. All are treated on the same footing.

"In the *Khulâsa*, Chapter on *Wakf*, third section, it is stated that the Sâhib-i-Manah [the author of the *Manah*] was asked with regard to such a *wakf* as this: 'a mosque has become ruined and part of it has come down, and the people of the *mahalla* (where it is situated) do not need it, and near to it is a mosque, can the remaining portions of the ruined mosque be sold and applied for the

[1] *Bokhâri*, pp. 10, and 108, *Jâmaa-i-Tirmizi*, p 38, see Appendix.

benefit of the other mosque?' The answer was, 'the matter must be referred to the Kâzi.'"

"In the *Kinia* it is laid down that when a reservoir or a mosque has become ruined, and people have abandoned it, the Kâzi has the power of authorising the application of the proceeds arising from the sale of the materials to another reservoir or mosque. And it is also stated there, that when there are two ruined mosques, and nobody knows who were the dedicators of the two, the Kâzi has the power of directing the application of the one to the other for the purpose of reconstruction. If the consecrators are known and have left their heirs, they might give the sanction themselves."

"In the *Khanièh* (*i.e.*, *Fatâwa Kâzi Khân*) it is laid down that when the mosque has become ruined, and the people of the locality do not require it, the matter should be taken before the Kâzi, that he may authorise the sale of the materials and the application of the proceeds to another mosque." . . . . . When a *wakf* [building] has become ruined, and there is no income forthcoming to repair or re-erect it, some have said the appropriator, and if he is dead, his heirs, may resume it; but Sadr-ush-Shahîd in his *Fatwa* has stated that this opinion is questionable and against principle."[1]

According to the *Radd-ul-Muhtâr*, where a mosque has fallen into ruin, and it is not known who had erected it, the *ahl-i-mahalla* can sell the materials, presumably with the sanction of the Kâzi, and apply the proceeds to the building of another mosque. A well can be dug in a mosque if it is to its benefit. The *wâkif* cannot let for hire for his own purposes any portion of the mosque premises. When a mosque has ceased, the *wâkif* cannot make use of it for any other purpose. "No profit should be derived from a mosque, nor can it be leased or turned into a private abode."

According to Abû Hanîfa and Abû Yusuf, the land which has once been dedicated to a mosque continues *wakf* even though it has become waste and the building fallen into ruin; and the *Fatwa* is according to their opinion.[2] And Abû Yusuf further holds, that with the permission of the Kâzi, the ruined or waste portion may be sold and applied towards the construction or maintenance of any other mosque nearest to the disused mosque. "And the same

[1] *Surrat-ul-Fatâwa*, p. 432.

[2] *Hâwi*. By *consensus* the *Fatwa* is with Abû Yusuf.

principle is applicable to any other religious or charitable institution."[1] According to the *Surrat-ul-Fatâwa*, the *Fatwa* is according Abû Yusuf.

According to the *Sharh-i-Multeka*, when the purpose of a trust fails, it is lawful to apply the income of the trust-property to an object nearest in its nature to the original purpose, *jins-i-karib*. For example, if the object of a *wakf* is a *hauz*, the income may be applied to a tank or canal; if it is a mosque, the income is to be applied to another mosque, or to fasting, prayers, &c."[2]

Shams-ul-Aimma al-Halwâni has declared that when a *hauz* (reservoir) or mosque becomes ruined, and nobody uses it, the Kâzi can direct the application of its materials to another *hauz*, or mosque. "In these times," says the author of the *Radd*, "it is essentially necessary to adopt the views of Imâm al-Halwâni, who authorises the Kâzi to give permission to apply the materials belonging to a mosque which has fallen into ruin to another which is in use."[3]

"When there are two *wakfs* and of both the *wâkif* is the same and the purpose the same, but owing to certain calamities, the income of one has diminished, whilst from the other a balance is left (over and above the expenditure), the Judge has the power to direct that the allowances of the servants of the first *wakf* may be made up from the balance of the income of the second." But the Kâzi is not invested with this power, if the purpose of the two *wakfs* is different. "For example, if a man make two dedications for a mosque, one for its building and the other for the imâm and the muezzin, and, owing to a decrease in the profits of the second *wakf*, the imâm and muezzin cannot be employed, then it is lawful for the Hâkim, in consultation with the leading people of the *mahalla*, to direct that the allowance of these officers should be paid out of the balance left from the *wakf* for the building, provided the *wâkif* is one and the same." The *mutwalli*, though he be the trustee of both endowments, cannot of his own motion apply the

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[1] The *Bahr* explains the difference between Abû Hanîfa and Abû Yusuf on one side and Mohammed, thus —"According to Mohammed the articles in the disused mosque go to the *wâkif*, but the mosque and land remain *wakf* perpetually, as Abû Yusuf holds, and cannot revert to the appropriator or his heirs to become their heritable property."

[2] *Radd-ul-Muhtâr*, Vol III, p 574 [3] *Ibid.*

balance of the proceeds of one *wakf* for the maintenance of the people provided for in the other. He must apply for and obtain the sanction of the Judge.

"In the thirteenth section of the *Jâmaa-ul-Fusulain*, it is laid down that when a person says his house or his room is for lighting such a mosque, and no more—that house or room will become *wakf* for the mosque." . . . . . "In the *Wâkiat-ul-Hisâmi* it is stated that if there is already funds for the lighting of the mosque, and it be considered desirable to apply the income of the house or room dedicated to building a minaret for giving *azân*, so that people may hear the call to prayers better, they may do so, but if it is not needful it should not be done."[1]

Where several *wakfs* are attached to one mosque, the *mutwalli* or manager may keep the income of all together, in fact keep a joint account, and if one shop attached to the masjid has fallen into disrepair, there is no objection to its being repaired with the income of another shop belonging to the same mosque.

If a person appropriate ground for the purpose of erecting a mosque he cannot afterwards resume or sell it, neither can it be inherited, because this ground is altogether alienated from the right of the individual and appertains solely to God. The reason of this is, that all things whatever are originally the property of the Almighty. When, therefore, the individual relinquishes his right in the ground, it reverts to its original state, and his power over it terminates in the same manner as a master's power over a slave terminates in consequence of emancipation and cannot be resumed.

Section III.

Dedications to Aqueducts, Inns &c.

According to Abû Yusuf, a dedication to any object of utility is effectuated by the *kawl* or word of the *wâkif*, as in the case of a mosque. For example, when a person erects an aqueduct for Mussulmans, or an inn for the occupation of travellers, or a caravanserai, or constitutes his land into a cemetery, the dedication becomes complete upon the declaration of the *wâkif*, and all his right of property

[1] *Surrat-ul-Futâwa*, p 435.

ceases therein.[1] "According to Mohammed, it abates when people have used the aqueduct or have occupied the inn or caravanserai, or buried in the cemetery, and it is sufficient if one person do so."[2] The rule is the same as to wells and cisterns, and if they are delivered to a superintendent, the appropriation is valid in like manner. It is stated in the *Mabsût* that the *Fatwa* is according to the Disciples by general consensus, in other words, the dedication may be effectuated in either way, *viz.*, by the actual declaration of the *wâkif* or by delivery, in other words, by the use of the place by a single person.

Any one can drink from the wells and cisterns and water his cattle and camels at them, and also use the water for ceremonial ablutions. In the use of all such objects of utility as abovementioned, there is no difference between the rich and the poor, and it is lawful for all alike to put up at inns and caravanserais and to drink from aqueducts and bury in a cemetery. But the income of a mansion appropriated for *ghâzis* or religious warriors can be taken only by those of their number who are necessitous. When a mansion is appropriated for the residence of pilgrims, mere wayfarers have no right to occupy it, and when the days of the season have passed, it should be let and kept in repair out of the rents and the surplus, if any, distributed among the poor.

A road or way is validly dedicated by the owner of the land declaring in the presence of witnesses that he has constituted it as such. But those lawyers who consider consignment necessary to the completeness of a *wakf* require that one person should pass over the way, in order that it may serve as evidence of user. According to Hillâl, the same rule applies to a bridge. Declaration alone (according to Abû Yusuf,) or user by one individual extinguishes the right of private property over such objects.[3] And the *Fatwa* is on this.

"When a body has been buried in the ground, whether for a long or short time, it cannot be exhumed without some excuse. But it may lawfully be exhumed when it appears that the land was usurped, or another is entitled to it under a right of pre-emption.

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[1] According to Abû Hanîfa, the right of the *wâkif* ceases, on the Judge making a decree, or, if the appropriation is by way of a bequest, upon the death of the *wâkif*. This is not accepted.

[2] *Alamgiri*, Vol. II, p. 554.

[3] *Ibid*, p 556.

Auzujundee being asked with regard to a masjid for which there no longer remained a congregation and all around it had gone to decay, whether it was lawful to convert it into a cemetery, answered 'No;' and being asked with regard to a cemetery in a village, where it had gone to decay, and there remained in it no traces of the dead, not even bones, whether it was lawful to sow the land and take its produce, answered 'No,' for in legal effect it is still a cemetery."

"A man makes his land a cemetery or an inn—the khirâj abates, if the land were khirajee, and this is correct."

"When a woman has made a cemetery of part of her land, divesting herself of the property and has buried her son in it but the piece of land is unfit for a cemetery by reason of an overflow of water upon it, and she wishes to sell the land, if it be still in such a state that people desire to bury their dead in it, she cannot sell it, but if they have no such desire she may.

"A man having dug a grave for himself in a cemetery, can another bury his dead in it? If there be space in the cemetery, it is proper that he should not interfere with the grave, but if there is no other space he may bury his dead in it. And the case is like that of a man who has opened out his prayer-carpet in a masjid, or put up in a caravanserai when another comes, and if there is space enough for him he is not to molest the other."

A cemetery or graveyard is consecrated ground and cannot be sold or partitioned. But when a place is found not to be a *makbara* (a burial-ground) but only one or two bodies are buried there, the actual spot where the bodies lie buried is consecrated. Whether a place is a *makbara* or not depends on the number of persons buried there, or evidence of dedication derived from the testimony of witnesses or reputation.

"When there is no fund or other means to repair a mosque with, a portion of the land or the outer premises may be leased for a term to raise money for the repairs."[1]

"No portion of the funds of the mosque should be spent for the ornamentation of a *mosque*, unless it has been provided for by the *wâkif*."[2] But the *ahl-i-mahalla*, people of the locality where the mosque is situated, may do so at their own expense."[3]

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[1] *Hâwi.* [2] *Ibid.* [3] *Ibid.*

"The paraphernalia of the Kaaba is *wakf* on the Kaaba, even until they are torn to pieces, so that no article can be removed unless lawfully disposed of by the *mutwallis* for the purposes of the shrine. And this principle applies to mosques, &c."

"It is lawful to make *wakf* of lands or property for the maintenance and preservation generally of mosques, *rubats*, and other pious *charitable* institutions."[1]

"A dedication in favour of a mosque is absolutely lawful according to Abû Yusuf, for a mosque exists forever until the Day of Judgment, and can never revert to private proprietorship even though it be ruined and wholly disused, nor can its material be taken to any other mosque, and on this is the *Fatwa*."[2]

"It is allowable for *Zimmis* [non-Moslems] to enter the holy shrine of the Kaaba, the sacred temple at Jerusalem, and all mosques for the purposes of work and other proper purposes, but their going to the *mihrâb*[3] of the mosque or the *maiza*[4] is objectionable."[5]

"All acts of indecency within the precincts of a mosque are forbidden, nor must one wash himself or expectorate or indulge in indecent talk or take instruments of war inside it. But a soldier may go in and offer his prayers and leave directly."[6]

"It is not proper for any person to enter a mosque unless he is clean. The gate of a mosque should not be kept closed at all times. If there is fear of theft, and there is no gate-keeper, there is no objection to keep the doors closed at other than prayer times."[7]

"If a mosque requires enlargement, and there is a piece of land adjacent to it which the owner refuses to sell, it is lawful to take it from him on payment of its proper price, whether he be willing or not."[8]

"Nothing belonging to a mosque should be given away, not even grass or old articles such as mats (unless they can fetch no price), but should be sold for some value to be applied for the purposes of the mosque."[9]

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[1] *Hâwi*

[2] *Ibid* See *post*

[3] The principal place in a mosque where the Imâm stands, a kind of high altar.

[4] The place for religious ablutions

[5] *Hâwi*

[6] *Ibid*

[7] *Ibid*

[8] *Ibid*

[9] *Ibid*

The *ahl-i-mahalla* can pull down a mosque and reconstruct it in better style, or improve it in any other way, and supply superior articles ; but this they can only do so with their own money, but *not* with the money of the *wakf*, unless the sanction of the Kâzi is obtained beforehand. This is stated in the *Khulâsa*. The *ahl-i-mahalla* can also construct reservoirs for drinking and washing (*Wuzû*), provided the consecrator is not known ; otherwise his prior permission must be obtained. His heirs, however, cannot raise objections to any improvement which the *ahl-i-mahalla* may propose to effect in the mosque."[1]

"The *Ahl-i-mahalla* can, with the sanction of the Kâzi, sell the materials of a disused and ruined mosque and build another with the proceeds thereof."

"A mosque is the property of God. The statement in the *Hedâya* is founded on weak authority." A mosque therefore, cannot be resumed or treated as private property.

"In the *Bazaziah* it is laid down that the *wâkif* cannot derive any benefit from the hire of any portion of the building of the mosque."

"Though a mosque may be ruined and be never used, still it is a mosque, forever consecrated to the eternal worship of God until the Day of Judgment, according to Abû Hanîfa and Abû Yusuf, and on this is the *Fatwa*, as is stated in the *Hâwi-ul-Kûdsi*."[2]

"When a mosque is so utterly ruined that it cannot be used or the people have abandoned praying in it, according to Abû Yusuf, it and all articles appertaining to it will be applied *with the sanction of the Kâzi* to another mosque."

"The same principle applies to all such institutions. In other words, when no benefit can be derived from a disused *lungar-khânèh*, well, cistern, &c., the materials or any thing appertaining to them will be applied to the nearest mosque, *lungar-khânèh*, &c. This doctrine is universally accepted as stated in the *Durrar*." . . . . .

"But whether the mosque has become ruined or dilapidated, or the people have no further need owing to another mosque close by, still it will not revert to the ownership of the *wâkif*, nor will it be lawful to take it or its property to another mosque (without the leave

[1] *Radd-ul-Muhtâr*, Vol. III, p 575. [2] *Ibid.*

of the Kâzi), and on this is the *Fatwa* as stated in the *Hâwi-ul-Kûdsi*."[1] "And so it is in the *Mujtaba*, in the *Bahr* and in the *Fath-ul-Kadîr*. And in the *Asaâf* it is stated that Abû Hanîfa and Abû Yusuf are in accord."

The author of the *Radd-ul-Muhtâr* discusses more fully the doctrine enunciated in the *Hâwi* that, according to Abû Yusuf's views, the ruined mosque or articles devoted to it, or property dedicated for it, cannot be applied to another mosque. He states first, that in the *Bahr-ur-Râik*,[2] the *Multaka* and the *Asaâf* it is expressly laid down that when a building or cistern or reservoir is ruined or abandoned, it may be applied with the leave of the Kâzi to another object nearest in character, *e.g.*, a mosque to a mosque, a well for a well, &c. Then he goes on to say, that this may seem inconsistent with the views of Abû Yusuf on which is the *Fatwa*, but he says in Abû Yusuf's rule there is no restriction. "And in the *Asaâf* and *Kâzi Khân* it is laid down that it is permissible. And Syed Imâm Abû Shuja was asked 'whether it was lawful to apply the income of a *lungar-khânèh* which had become disused to another close by? He answered, 'yes, as in the case of a mosque which has become ruined, and the people of the village have given up praying there. The matter should be taken to the Kâzi and his leave obtained, and thereupon it would be lawful.' 'In the *Zakhîra* it is stated from Shams-ul-Aimma al-Halwâni that he was asked a similar question as to an abandoned mosque, and he answered in the affirmative. And Shaikh-ul-Imâm Amîn-ud-dîn ibn Abd-ulaâl,[2] Shiakh-ul-Imâm Ahmed ibn Yunus ash-Shibli, Shaikh Zain ibn Nujaim, Shaikh Mohammed al-Wafâi and others have given *Fatwas* to the same effect" . . . . . "It is sufficient to rely on the *Fatwa* of Imâm Abû Shuja and Imâm Halwâni, especially in these days when it is frequent for the care-takers, embezzlers, and other dishonest people to steal and usurp the property of disused mosques, &c."

In the *Hâwi* it is stated (by way of an example) that when one reservoir has become destroyed and there exists no need for it, the *wakfs* attached to it would be applied in support of other reservoirs.[3]

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[1] *Radd-ul-Muhtâr*, Vol. III, p. 571. [2] *Ibid*, p 575. [3] *Ibid*, p. 642.

It is laid down in the *Khulâsa*, that when a mosque or reservoir has fallen to ruin and there is no further need for them, the inhabitants having left the neighbourhood, the *wakfs* attached to them will be applied to other mosques or reservoirs.[1] For the same reason, if the sovereign or his delegate were to withdraw a piece of land from the *Bait-ul-mâl* and grant it to an individual for the construction of a canal for the use of the public, and subsequently, owing to the depopulation of the country there exists no need for such a canal, the grantee does not acquire the land as his private property; he will hold it subject to the condition of storing water for the use of flocks and cattle. According to the Shâfeïs he would take it absolutely.

The *Nahr* states thus the result of the above principles :—"According to us"[2] when the beneficiaries of a particular appropriation have ceased to exist, the proceeds arising therefrom will be applied to a *wakf* of the same nature. Consequently, the *wakfs* of one mosque will be applied to the support of another mosque and of a reservoir to another reservoir. To withdraw land from the *Bait-ul-mâl* is analogous to the creation of a *wakf*. And, therefore, when land is thus withdrawn and given to a person for the construction of a canal for the use of the public, it will on the failure of the canal be applied to the watering of the flocks and cattle and similar objects.

If the cattle belonging to a *wakf* become unfit for work, the *mutwalli* is entitled to remove and sell them.

Things belonging to the mosque but not needed may be sold by the *mutwalli* with the sanction of the Kâzi or the Judge where there is one.

When a village, in which there exists a brick-built well or reservoir, has become completely depopulated, the materials of that reservoir or well may, with the sanction of its *wâkif*, or, in his absence, of the Kâzi, be used for the building of another well or reservoir in a contiguous village.

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[1] When the sovereign or imâm withdraws a piece of land from the Public Treasury (*Bait-ul-mâl*), that is, makes it rent-free and designates the purpose to which the income derivable from it should be applied, it becomes *wakf*. Mere withdrawal of land from the (*Bait-ul-mâl*), or declaring it rent-free, does not render it necessarily *wakf*, though it resembles in its nature a *wakf*.

[2] Meaning the Hanafis

When anything is dedicated to a mosque which afterwards becomes ruined, the subject of the dedication does not revert to the grantor or his heirs, but will be used for the nearest mosque.

When the subject of the *wakf* is unfit for the purpose for which it is intended, the *wakf* will be avoided. For example, if a piece of land be dedicated for a cemetery, and a corpse be even buried in it, but if it afterwards appear that the place is unfit for a burial-ground, and people are unwilling to use it as such, the dedicator may sell it, for the place is not suited for the purpose for which it is intended, and that circumstance would avoid the *wakf*.

If a land dedicated to some "good" purpose has become uncultivated, and owing to its distance from town no person is willing to take a lease thereof, and no profit can be derived from it, nor can any buildings be raised upon it, such land may be sold according to Kâzi Khân, with the sanction of the Kâzi and its proceeds applied for other meritorious purposes.

If a road or path which leads to a mosque becomes dilapidated, it can lawfully be repaired with the funds of the mosque, when it is the only mode by which the members of the congregation can gain access to the mosque. Similarly, if a *lungar-khânèh* is created on the banks of a river and people have access to it only by means of a bridge, if the bridge becomes dilapidated, it may be repaired out of the funds of the *lungar-khânèh*.

If a *lungar-khâneh* becomes ruined, and the place where it is situated is abandoned entirely, its materials may be sold with the permission of the Kâzi, and the proceeds applied to the purposes of the nearest *lungar-khânèh*.

Section IV.

Principles Applicable to Cases where the Primary or Intermediate Objects have Failed.

In connection with the foregoing subject it must be remembered that the failure or non-existence of the initial or primary object of a *wakf* does not, under the Hanafî Law, affect the operative character or validity of the *wakf* or avoid it. So also the failure or extinction of the intermediate objects only accelerates the ultimate reversion but does not cancel or avoid the *wakf*.[1]

[1] *Radd-ul-Muhtâr*, Vol. III. p. 641 ; Kâzi Khân, Vol. IV, p. 87.

Consequently, when a *wakf* is made in favour of children that are unborn, or any non-existing object, it is valid.[1] Hanafi Law.

"When a *wakf* is made in favour of Zaid's children, (and Zaid has no children existing at the time,) or to a *masjid* which has not been erected, the appropriation is valid, and the rents and profits will be applied to the support of the poor, until children are born to Zaid, or the mosque is erected. This is according to the *Imâdia*. In the *Nahr-ul-Fâik* it is stated further, that when the object for which the settlement is made has not come into actual existence, but the purpose can be carried into effect, the rents and profits will be applied to that purpose so far as it is possible to do so. For example, when a man makes a grant for the support of the students of a madrassa which has not been erected, if lectures are given to students in any other building, such students will be entitled to support from the *wakf*.

"The object of a *wakf* may be non-existent," says the *Radd-ul-Muhtâr*, "in two ways:—*Firstly*, the beneficiary may be non-existing when the *wakf* is made, when it it called *wakf munkata-ul-awwal*, (*cut off initially*); and *secondly*, the persons, for whom the *wakf* is made, may cease to exist after the creation of the *wakf*, when it is called *wakf munkata-ul-wasat* (*cut off in the middle.*) Examples of both classes of cases are given by Kâzi Khân, *e.g.*, a man makes a *wakf* for the children born of his loins, if he has no children at the time, it is a *wakf munkata-ul-awwal*, and the rents and profits will be applied to the benefit of the poor." "If children are born to him afterwards, then the rents and profits will be paid to them."[2]

"Similarly, as stated in the *Asâf*, when a settlement is made in favour of one's *walad* (child), and there is no *walad* existing at the time, but there is a grandson, the income of the *wakf* will be given to the grandchild until a child is born to the *wâkif*."

"An example of the second or *wakf munkata-ul-wasat* arises in this way;—a *wakf* is made in favour of two sons and *after them* in favour of their children and children's children, and subsequent thereto one of the sons dies leaving him surviving the other son, it is a *wakf munkata-ul-wasat*. In this case, half of the rents and profits will go to the surviving son and the remainder to the poor

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[1] *Radd-ul-Muhtâr*, Vol III, p. 611; Kâzi Khân, Vol. IV, p. 87.

[2] *Ibid*, p. 611.

and indigent, and when the surviving son dies the entire rent and profits will be given to his children,[1] for the *wâkif* has reserved the interest of the *wakf* for the grandchildren only after the demise of both the sons. But should it appear that the intention of the *wâkif* was that the surviving son should take the entire benefit, or the interest of the deceased son should descend to his issue, effect would be given to such intention."

"The *Khairiyèh* states the law somewhat differently, *viz.*, where the object of the *wakf* is not existing or ceases to exist, the rents and profits will be applied to purposes nearest the object for which the donor intended the *wakf*. This view, however, is not according to 'us' (that is, Hanafi doctors) but represents Shâfeï doctrines. According to the Shâfeïs, where a *wakf* is made in favour of lineal descendants and they fail, the *wakf* will be applied to other people 'nearest' to the *wâkif*."[2] According, to the Hanafis, it will be applied to the poor.

"When a man makes a *wakf* of his property,—a moiety—in favour of his poor kindred, and a moiety in favour of the indigent generally, it has been held that the relatives, in case of indigence, would be entitled to a share in the other moiety."

"Ibrâhîm-ibn-Yusuf and Ali-ibn-Ahmedal Farsi and Abû Jaafar Hindwâni are in agreement on the point. And it is stated in the *Nahr*, that the same is the view of the Kâzi-ul-Kuzzât Maulâna Ali al-Halabi, who wrote his *Risâlat-ul-Kubrâ* about the period when Maulâna Mohammed Shah Baderna's rule came to an end. And in the *Kuzi Khân* it is laid down that, according to the approved doctrine, when a *wakf* is made in favour of an individual *and* the poor generally, if that person subsequently becomes poor, he is entitled to participate in the *wakf* for the poor."

Distribution of a *wakf* to a wife and son.

"According to Kâzi Khân, if a man were to make a *wakf* of his land, a moiety in favour of his wife and the other in favour of his son Zaid, with a condition that upon the wife's death, her moiety be *wakf* for his (the grantor's) children,—Zaid would be entitled to participate in that moiety also as one of the children. The wife's moiety would therefore go to Zaid and the rest of the

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[1] *Radd-ul-Muhtâr*, Vol. III, p. 641

[2] *Ibid*, p. 641.

wâkif's children, and Zaid's moiety would be for him alone. There is no difference of opinion on this point."

The *cy pres* doctrine in the Mahommedan Law.

Mere vagueness or uncertainty will not lead to the failure of a *wakf*, for in such a case the law itself would supply the defect by declaring that the trust should be in favour of such objects as approach nearest in character to the intended object of the *wakf*; or, even when that is not expressed, to the support of the poor and needy. In the absence of explicit directions on the part of the *wâkif*, the Hâkim has the power of framing a scheme by himself or in consultation with the beneficiaries, for the administration of the *wakf*. The principle therefore laid down in *Morice* v. *The Bishop of Durham*,[1] which has been occasionally endeavoured to be applied to *wakfs*, is not applicable to trusts or consecrations under the Mahommedan Law. For the *cy pres* doctrine is carried to the utmost limit in the Moslem system, and the failure of the original purpose does not in any case cause the failure of the *wakf*.

The poor are the ultimate beneficiaries in every *wakf*.

The poor form, by necessary implication of the law, the ultimate beneficiaries of every *wakf* created in favour of individuals or the descendants of the *wâkif*. Where, therefore, the primary object fails, such failure instead of voiding the *wakf* "only accelarates" the ultimate application.

Again, where the dedication is to a religious or charitable institution, which, in course of time, ceases to exist, the property so dedicated, instead of reverting to the grantor or his heirs, would be applied, as already pointed out, to some other religious or pious institution, similar in character to the one which has failed, or to any other object by which benefit may accrue to human beings.

Section V.

The Income of the Wakf Estate, How to be Applied.

According to the *Fatâwa Alamgiri*,[2] "the income of the *wakf* property is to be expended, in the first place, on necessary repairs, whether the *wâkif* has made it a condition or not, and next, if nothing else has been specified, on such things as are nearest and most essential to the general purpose or policy of the dedication, as,

[1] 10 Vesey, p 399.

[2] *Fatâwa Alamgiri*, Vol. II, p 468.

for instance, in providing an imâm for a mosque and a professor for a college. But if anything else has been specified, the income must be applied to that immediately after the repairs."

Similarly, in the *Hedâya* it is laid down, "that it is incumbent that the income of the *wakf* should be, in the first instance, expended in its repairs [or maintenance] whether the *wâkif* has made a condition to that effect or not, inasmuch as his object was that the income should form a perpetual fund, and as a perpetual income cannot be derived from the *wakf* property unless it is maintained in proper condition, there is a necessary attendant upon it."

The *Radd-ul-Muhtâr* states as follows :—"The rents and profits arising from a property which is constituted *wakf* must first be applied towards its preservation and maintenance and the payment of the wages of the care-taker or custodian."

"The income of the *wakf* must be first applied in keeping the property in a proper condition so as to yield a permanent income. If the *wakf* property consists of fruit-bearing trees, a portion of the income must be spent in buying new plants. So, also, if it is land, which without irrigation will not yield any crops, the first charge on the income must be to do the needful for that purpose ; so it is stated in the *Muhît* and *Fatâwa Kâzi Khân*."[1]

In case of immovable property, therefore, all expenses incidental to its due maintenance in proper condition according to its nature, must be first paid out of the income ; the wages of persons entrusted with its preservation and management stand on the same footing. The balance is to be applied for the purposes of the *wakf*. If the *wakf* is in favour of individuals, such as the *wâkif's* children, it is to be applied to their benefit or given to them as the case may be, in accordance with the provisions of the *wakfnamah*. If there are no express provisions, the application will be in accordance with the general design of the *wakf*. If the intention of the *wâkif* was that his children should be supported with the income of the *wakf*, it will be done according to his wishes.

Similarly, in the case of a *wakf* for any other purpose. The general design of the trust should be kept in view, even when the particulars are not sufficiently defined.

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[1] *Radd-ul-Muhtâr*, Vol. III, p. 581.

"For example, if a dedication is made for a madrasssa and nothing further is said, the residue of the rents and profits after deducting the cost of maintaining the building shall be applied to maintain the proper staff of teachers. When the dedication is to a mosque, the balance shall be applied to the employment of the usual servants and the supply of the usual articles of furniture, &c., necessary for the performance of the worship, even though the *wâkif* should not have mentioned it." The primary object should be to maintain the purpose for which the dedication is made. If a dedication is made to a mosque and the salary set apart for the imâm is not sufficient to employ one, the provision made by the donor should be set aside and a reasonable allowance should be made for that purpose. A mosque once dedicated should not be allowed to lie useless. The result is that, in the first place, the cost of maintaining the *wakf* should be defrayed from the income and after that, each object will take precedence in accordance with its relative importance. But if the expenses are specified by the *wâkif*, care will be taken to carry out his wishes with due regard to the primary object of keeping up the *wakf*. Disbursements from *wakf* property.

"In the application of the proceeds, the first thing to which attention should be directed is the maintenance of the *wakf*. Should the entire income be necessary to put the *wakf* buildings or property in repair, it may be so applied, and in the case of a mosque, no person, not even the imâm or muezzin should get any salary until the repairs are made." [This passage shows the importance which is attached to the maintenance and preservation of the *wakf*. The primary object of the *wakf* being the perpetual consecration of the property for meritorious or pious purposes, the law insists that the first duty of the curator should be to preserve the building in a state of repair, and if it is in such a condition that it is likely to fall into ruin, the income is to be applied primarily for its restoration and repair.] "If anything remains over after defraying the cost of repairs, it should be given to those whose discharge would cause injury to the *wakf*. After this has been done, the other matters connected with the *wakf* should be carried into effect with due regard to their relative importance. Those people from whose dismissal no injury would accrue, will not get any portion of their allowance until the absolutely necessary repairs are completed. But when those people do work for the *wakf* they will

get their proper wages, though not the allowance fixed in the *wakf-namah*." This refers to a case where the income is not sufficient to defray the costs of urgent repairs as well as the full allowance of the servants of the *wakf* or of the beneficiaries.

"When the *wâkif* has provided that after defraying the cost of repairs and maintaining the institution, the surplus should be distributed among the poor or the beneficiaries, it is nevertheless incumbent on the *mutwalli* to deduct every year a certain sum from the income for repairs, even though there is no immediate need for it—so as to enable him to provide a fund therefor; for it so happens that owing to some unforeseen contingency, there may not be any income at the time." "If a house is made *wakf* for another person, he is entitled only to the income arising therefrom but not to occupy it. Similarly, the person for whose occupation the house is made *wakf* is not entitled to its income." The correctness of this doctrine appears to have been doubted, and in any case the Kâzi would have it in his discretion to authorise any act which may be beneficial to the *wakf*. The principle, however, which is deducible from the above doctrines is, that the beneficiaries cannot, of their motion, under any circumstance, change the nature of the dedication.

The mode in which a *wakf* building ought to be used.

Kâzi's discretion.

If there are any debts on the *wakf* property, the *mutwalli* should, either by leasing the property, or in any other reasonable manner, liquidate such debts.

If there is no income at all accruing from the *wakf*, and the endowed property is going to ruin, the Kâzi has the power to authorise the *mutwalli* to let temporarily the whole or any portion of it, and with the proceeds thereof to repair it. Where the income of the *wakf* premises is not sufficient to cover the outlay in its maintenance, or when the *wakf* is falling into ruin, and there is every probability of its dissolution, and the income is not sufficient to cover the cost of repairs, the Kâzi has the power of directing that it may be sold and with the proceeds thereof certain other property may be purchased subject to the same trust.

This doctrine is laid down by Abû Yusuf and it will be acted upon as long as it is possible to do so. If it is impossible to sell the *wakf* property or to apply the proceeds of the sale for the beneficiaries or for the benefit of the poor, in that case only effect would be given to the doctrine of Mohammed, that where the purpose has failed absolutely, the property would revert to the heirs of the donor.

"When a *wakf* is made for students *and the wakf is small*, only poor students will be supported. But generally the word 'students' implies want, and when a *wakf* is made for students in general, it is confined to indigent students alone, for students are almost all in straitened circumstances. Similarly, the *wakf* of a Koran in a masjid and books in a madrassa is generally confined to the poor, unless it can be shown that the books are not available." According to the *Khulâsat-ul-Waknièh*, however, in the case of a *wakf* of books or of a *wakf* to students, the poor stand in the same category as the well-to-do. It further lays down the principle that such *wakfs* may be looked upon from two points of view:—(1) that the poor and rich are equal as in the case of *Mussâffir-Khânèhs*, cemeteries, tanks, &c., the benefit of which is shared by all alike. "In respect of the benefit arising out of these objects of *wakf*, custom makes no difference in the position of an indigent and a well-to-do person. In the case of a *wakf* of books, the rich student stands in the same position as the poor regarding the difficulty of obtaining some of the books; and it must be remembered that the object is to benefit all." This seems to be the generally accepted doctrine. (2) That the *wakf* is only for the poor.

Wakf in favour of students.

If a *wakf* is made of books for a specified place, their use will be restricted to that place, and the books will not be allowed to be taken away from there. And if it is for students, then every student is entitled to make use of them but cannot remove them from the place. In matters relating to the use of a *wakf*, the provisions made by the *wâkif*, if legal, should be followed. The jurists look upon the conditions imposed by the *wâkif* as conditions imposed by the law. But in order that any restrictive condition may be binding, it must be satisfactorily proved that the *wâkif* really and intentionally imposed the same.

"When the *wakf* is in favour of individuals, the building cannot be enlarged without their consent." In other words, the beneficiaries of a trust have a right to be consulted in any alteration in the character of the *wakf* as may be likely to entail serious expenditure.

"If a house is made *wakf* for the dwelling of another, the duty of keeping it in repairs devolves on him. If he has no means, the Kâzi may let it for a while, and with the rent thereof repair the same."

"If a building land is made *wakf*, so that the income arising therefrom is to be applied for the purposes of the *wakf*, and the building has become untenantable or the land has become unculturable, the Kâzi has the power of authorising its sale and the investment of the proceeds in other property for the purposes of the *wakf*."

When a *wakf* building is falling into ruin, the *mutwalli* is not entitled to sell the trees planted within it for the purpose of repairing the house, but he can hire out the house, and with the rent thereof repair the building.

CHAPTER XI.
GENERAL PRINCIPLES.

Section I.

The Powers of the Wakif.

The *wâkif* may lawfully reserve the governance of the *wakf* for himself during life, and the *Fatwa* is thereon.[1]

It is also lawful for the *wâkif* to make a condition to the effect that the *wakf* premises may be exchanged for other property or that it may be sold, and the proceeds thereof invested for the purposes of the *wakf* in other lands or investments, with which the objects of the trust may be carried out.

As regards the power to exchange the *wakf* property, for other property, the question resolves itself into three heads: (1) if the donor has reserved to himself or to the *mutwallis* generally the power of making the exchange, in such a case, the exchange may be made without any question; (2) if no power is reserved, but the property yields no profit, then the exchange may be made with the sanction of the Kâzi; (3) if it is simply advantageous for the *wakf* to make the exchange, in such a case the exchange is not lawful.

The *wâkif*, according to Abû Yusuf, can lawfully reserve for himself the power of exchange and Kâzi Khân has said that this is correct, and in another place that it is correct *bil-ijmâa*, by consensus.

A mere reservation of power to sell would lead to the invalidity of the *wakf*, unless the power of investing the proceeds in other property subject to the same trusts is attached to it, either directly, or indirectly.

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[1] *Radd-ul-Muhtâr*, Vol. III, p. 598; *Surrat-ul-Fatâwa*; *Fath-ul-Kadîr*.

Condition of exchange lawful.

When there is a condition in the *wakf* "that he may exchange the land for other land as he pleases and that the land so obtained shall become *wakf* instead of the first," the appropriation and the condition are lawful according to Abû Yusuf, and so also when there is a condition "that he may sell and make an exchange for the price." And it has been said that Hillâl was of the same opinion, and the *Fatwa* is in conformity with it.

An exchange once made debars the exercise of the power a second time unless intention apparent.

But after the exchange has once been made, it cannot be made a second time, unless there are words indicative of an intention that he may exchange continually. When the words are "that I may exchange for other land," he cannot exchange for a mansion nor *vice versâ*. But he may purchase *khirâj* land with the price. When the power to exchange is reserved to himself he may appoint an agent for the purpose, but if he should bequeath the power to an executor, the executor of such executor cannot exercise it. And if the power is reserved to another and himself the other cannot exercise it singly, but the appropriator himself may lawfully do so. When the power to exchange is given to "every one that may preside over this *wakf*," it is lawful, and every president may exercise the power. But when the appropriator has declared "on condition that such an one shall have the power of exchanging," the person authorised cannot exercise the power after the death of the *wâkif* without an express condition to that effect. The *kyyim* or administrator has no power to exchange unless expressly authorized to do so. And when it is made a condition that *he* may exchange, the appropriator may also exercise the power without a similar condition in his favour.

Without an express condition in the *wakf*, the and cannot be sold or exchanged, though it should be saltish and useless. In one place, Kâzi Khân has said that the judge may order its sale, though there should be no condition to that effect when he thinks it expedient, but in another he denies that the judge has any such power. The most trustworthy opinion, however, is that the judge may lawfully order the sale of land if it be quite useless and there is no income derived from it, provided that the sale is not at an inadequate price.[1]

When a man has said, "My land is a *sadakah-moukoofa* to Almighty God forever, on condition that I may *employ* the produce

[1] Baillie, p. 597; *Alamgiri*, Vol. II, p. 494.

as I please," he may lawfully do so. But if he should give it to the indigent, or employ it in pilgrimage, or bestow it upon a particular individual, he cannot reclaim it. And in like manner, if he should say, "I have given it to such an one," he has no power to reclaim it. He may give it to one set after another, yet if he were to apply it to himself the *wakf* would be void. It would be different if he had said "on condition that I may *give* it to whomsoever I please."

Where an appropriation is made subject to a condition that the *wâkif* shall have the power of giving the produce to whomsoever he pleases, the *wakf* is lawful; and he shall have the power of doing whatever he likes with the income during his lifetime, but cannot make any disposition respecting it to continue binding after his death, nor can he apply the income to his own purposes, (*lit.* cannot eat of the produce himself). His doing so, however, will not *avoid* the *wakf*. But he may bestow it on anybody he likes. A man makes a *wakf* of his estate on condition that the administrator may give the produce as he pleases, this is lawful; and he may give it to both rich and poor. If one should say, "on condition that such an one may give the produce to whomsoever he pleases," it is lawful; and the power may be exercised either during the lifetime of the appropriator or after his death, and the person so authorised may give the income to his own child and *nasl*, and also to the child and *nasl* of the appropriator, but not to himself. [It is not clear what the effect will be, if the person authorised were to take the profits of the *wakf* estate himself. The *Alamgiri* goes on to say that "the power does not pass out of his hands on his saying 'I have given the produce to myself.'" A mere declaration may not have the power of destroying the power, but will not an unlawful application of the income to his own use amount to breach of trust?][1]

If a person were to say, "My land is *sadakah-moukoofa* for the sons of such a one on condition that I may select of them whom

[1] What follows is not recognized by the jurists of Balkh, *viz.*, the passage "but if he were to say, I have given to the appropriator, the *wakf* would be void according to those who say that a man cannot make a *wakf* in his own favour" According to the rule upon which is the *Futwa*, he may give it lawfully to the *wâkif*.

I please," it would be as he has said, and he may select as he pleases or give the whole to one ; and if he were to say, " I make no selection this year," it would be lawful, and the produce would be [divided] among them all equally. And if he were to say " on condition that I may deprive whom I please among them," and he were to deprive them all but one, it would be lawful ; and though *by analogy* he should not be able to deprive them all, he has that power also, *on a favourable construction.* But he cannot restore those whom he has deprived and the *wakf* would be for the poor. If he were to say " I have deprived them of the produce of this year," they have no right in that year's produce and it passes to the poor.[1]

If a man were to constitute a *wakf* in favour of the mother of his children (*umm-ul-walad*),[2] subject to the condition that if she marries after his death she is to have nothing, and she does marry but is subsequently divorced ; in these circumstances she has nothing, unless it were provided that in the event of being divorced, she should be restored to the benefit of the *wakf.* In like manner, when a *wakf* is for the sons of such an one except those who go out of the city, and some of them go out but return again, or when it is for the benefit of the sons of such an one who are acquiring knowledge, and some of them abandon their studies which afterwards they resume, the parties continue to be deprived of the benefit of the *wakf,* in the absence of any condition to the contrary. And if one should make his land a *sadakah-moukoofa* on his child and *nasl* for ever, and after them on the poor with a condition that any of them, who may leave the sect or doctrine of Abû Hanîfa for that of Shâfeï, shall lose the benefit of the *wakf,* those abandoning the sect will be deprived of its benefit. Similarly, if he had said when any one of them shall leave the doctrine of the Sunnis and become a heretic he shall be expelled ; and one of them does apostatise, he is to be expelled. A man and woman are on the same footing ; and when it is made a condition that if one should depart from the established doctrine he is to be expelled ; and one of them does so and then returns, he is not to be restored to the benefits of the

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[1] *Fatâwa Alamgiri*, Vol II. pp 495 to 501 , Baillie, p 595, *et seq*

[2] *Umm-ul-walad* is the designation given to a female slave who bears a child to her master, and thus becomes enfranchised.

wakf without an express condition to that effect. In like manner, when a particular doctrine has been specified and there is a condition that if any depart from it, he is to be deprived, regard must be had to the condition. So also, when the condition is "that if any of my kindred go from Bagdad he is to have nought," respect must be had to the condition, except that in this case if he return to Bagdad, he would be restored to the benefits of the *wakf*.[1]

Among conditions that must be respected, Khassâf has mentioned a condition that the superintendent shall not let the lands, and if he does let them, the lease shall be void. If the *wâkif* makes a condition that he shall not enter into an agreement for gardening or cultivation on the basis of a division of produce, or provides that when the superintendent lets the land, he shall be expelled from the office, in such cases if he should act contrary to the conditions he is to be expelled and the Kâzi shall appoint another, whom he can trust to carry out the condition.

The *wâkif* can reserve to himself, at the time of the dedication, the power to alter the beneficiaries of the trust or their interest in it. He cannot do so afterwards. "The *wâkif*," says the *Radd-ul-Muhtâr*, "has no power to alter or change the conditions (provisions) of a *wakf*, unless he has expressly reserved to himself the power of doing so.[2] If he has reserved to himself the power of adding to the beneficiaries or removing any person from that category, or of removing the *mutwalli* from his office, it will be lawful for him to do so. No alteration, however, can be made in the nature or character of the *wakf*. Similarly, it is not lawful for the *mutwalli* to go beyond the conditions laid down in the *wakfnamah*. A condition in the *wakfnamah*, to the effect that the *mutwalli* shall have the power of increasing the allowance of anybody or reducing it or adding anybody or removing any one is lawful. At the same time, the *maslahat-ul-wakf* (the policy of the *wakf*) is to be kept in view."[3] "If a person,"[4] says Kâzi Khân, "in good health make a *wakf* of land for the indigent and deliver it over to a

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[1] *Alamgiri*, Vol II, p 504.

[2] Comp *Hedaitoonissa* v. *Ajzal Hossain*, 2 All H ..., 420

[3] *Maslahat* here means the policy or purpose What is intended to be conveyed is undoubtedly this, that in any alteration which may be made, the original purpose or object or policy of the trust should not be ignored

mutwalli, and at the time of his death direct his executor to pay out of the proceeds thereof so much to so-and-so, that would not be valid, for he had parted with his right over the proceeds at the time of the *wakf*. But he can do so, if at the time of dedication he reserved to himself the power of giving directions for the application of the proceeds."

Nor can the *wâkif*, who devotes property to any meritorious or pious uses and transfers the proprietary right therein to the Almighty take it back at his pleasure from the *mutwalli* whom he has constituted god's proxy and give it to another person, unless on the creation of the trust he reserved to himself in express terms the right to do so.

If a person declare, that if necessary the *wakf* land may be sold and the proceeds invested in other property, all the incidents of *wakf* would attach to the new property which will be subject to the same conditions as the original property.[1]

The *wâkif* may lawfully reserve to himself the power of excluding any person from the benefit of the *wakf* or adding to the number of the beneficiaries or making a reduction in their allowances.

Though the *wâkif* make a condition that the King or Kâzi should not interfere in the management of the *wakf*, still the Kâzi will have his superintendence over it, for his supervision is above everything.[2]

A *wakf* house situated in one *mahalla* cannot be exchanged for a house in another *mahalla*, unless the locality is more advantageous. The Allâmah has laid a further restriction on the freedom of altering the investment, by imposing a condition that the thing for which the *wakf* property is exchanged, or the new investment, should be of the same nature as the former property. In the *Radd*, however, the author holds that there should be no such restriction, as it is essential to see which investment would be most profitable. For example, a man may have made a *wakf* of shops, and it may be more profitable to invest in land the proceeds arising from the sale of such shops, as yielding a larger income for the purposes of the *wakf*. Hence, when the power is vested in the *mutwalli* or the *wâkif* to dispose of the *wakf* property and invest the proceeds in other property similarly subject to the conditions of

[1] *Radd-ul-Muhtâr*, Vol. III, p. 599. [2] After the *Bahr*.

wakf, there should be no such restriction as to insist that the new property should be of the same character or nature as the former property.

The proceeds of *wakf* property may be invested in *dirhems* and *dinars*. It must be remembered, however, that when an investment takes the form of actual money, there is a possibility of the fund being wasted, and therefore it is undesirable to keep the proceeds of a *wakf* in that shape. If, however, it is in a shape from which profit can accrue without loss to the *corpus*, as in the case of Government securities, the investment is lawful. The Kâzi, and, in certain cases, the *mutwalli*, are entitled to override any condition made by the *wâkif* which is inconsistent with the nature of the *wakf* or opposed to the requirements of the very object for which the *wakf* is constituted. For example, if there is a condition to the effect that the Kâzi should not remove the *mutwalli* appointed by the *wâkif* or his successors in office, the Kâzi would nevertheless be entitled to remove any *mutwalli* who proved himself unfit or committed misfeasance or misbehaved himself in the trust. Or, if it is stated in the *wakfnamah* that the *mutwalli* shall not grant a lease of the *wakf* property for more than one year, and it appears that no person is willing to take a lease for a year, the Kâzi has the power to authorize the *mutwalli* to let the land for more than a year. Or, if the *wâkif* has declared that no alms should be given to the indigent who derive their subsistence from a certain mosque, the *mutwalli* is empowered nevertheless to give alms to such people. Or, if he has provided that the person for whom the *wakf* is constituted shall get fixed rations daily, the *mutwalli* may, with the consent of the beneficiaries, commute the same into money payment.[1] The beneficiaries may even ask for commutation.

The Kâzi is also authorized to increase the pay of the imâms, if it is insufficient, and if the officer is learned and religious, *i.e.*, deserving.

The conditions laid down by the *wâkif*, if lawful, are to be strictly carried out in the same way as if they were the commands of the Lawgiver.[2]

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[1] *Radd-ul-Muhtâr*, p. 601.

[2] *Ibid*, Vol. III, p. 643.

In carrying out the provisions of the trust the intention of the consecrator must be solicitously regarded, and in case his meaning is not distinct, recourse should be had to evidence to explain the meaning, and the inferential shall be considered equally with the actually expressed.

But when the language is upon the face of it unequivocal and unambiguous, no outside evidence will be let in for the purpose of altering or modifying the intention of the *wâkif*. For example, if the *wâkif* has declared in unequivocal language that he endows certain property for his children who are females, no evidence will be admitted to show that he also intended to include males. But, where, from the language of the *wâkif* itself, it can be inferred that he meant to include the males, though using the word females, they would participate with the female children. In understanding, however, the meaning of the donor from the actually expressed words, consideration should be paid to the circumstances of the particular case and the customary use of language among the people.[1]

If the words are capable of two meanings, the construction most consistent with the intention of the *wâkif* must be adopted.

Conditions laid down by the *wâkif* are equivalent to the commands of the Lawgiver.

"In the Chapter on *Wakf* in the *Inâm-ul-Mufti aala Jawâb ul-Mustafti*, it is laid down that the observance of the rules laid down by the *wâkif* are obligatory, for the jurists hold such rules to be equivalent to the *Nass*, *viz.* rules laid down by the Lawgiver."

"But the rules laid down by the *wâkif* have not that binding character in certain instances :—

"(1) If the *wâkif* should have made a condition that the Kâzi shall not have the power of dismissing the *Nâzir* or *mutwalli*, the Kâzi nevertheless has the power of dismissing a *mutwalli* who has been found to be untrustworthy.

"(2) If the *wâkif* has made a condition that the *wakf* property should not be leased for more than a year, and it appears that nobody is willing to take a lease for one year only, or if it appears that it is to the advantage of the beneficiaries, the property should be let for a longer term, the Kâzi has the power of authorising the grant of a lease for a longer term, but the *mutwalli* has no power to do so of his own authority.

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[1] *Radd-ul-Muhtâr*, Vol III, p. 611.

"(3) If the *wâkif* has made a condition that the Koran should be read for ever over his grave, such condition may be departed from.

"(4) If he has made a condition that so much grain should be bestowed on the beggars asking for alms at the door of his mosque, the condition may be varied, and the alms may be bestowed on such beggars as do not ask for alms there.

"(5) If he has made a condition that cooked food should be bestowed on the recipients, the *mutwalli* has the power of giving them the value thereof, and the recipients can even ask for payment in cash.

"(6) If the imâm is a learned and pious man, and the allowance fixed by the *wâkif* for him is not sufficient, the Kâzi has the power of increasing it.

"(7) If there is a condition to the effect that the *wakf* property should never be changed, should the Kâzi deem it advisable he has the power to authorise the same."[1]

Section II.

The Powers of the Wakif and Conditions in Wakf.

A *wakf* with an option.

When a dedication is made subject to the exercise of an option on the part of the *wâkif*, according to Abû Yusuf, "the *wakf* as well as the condition" is valid, provided there is a determinate period fixed, within which the option should be exercised. For example, if a man were to say, "I constitute this house as *wakf*, but I shall have an option to set it aside within three days," if the option is not exercised, the *wakf* becomes absolute after three days, but if the time is uncertain and wanting in specificness, the *wakf* is invalid.

The jurist Abû Jaafar holds that the *wakf* should be considered as valid, and the condition void (*bâtil*). Hillâl and Mohammed hold that the reservation of an option invalidates the *wakf* itself, whilst Yusuf ibn Khâlid declares that the *wakf* is valid in all cases, the condition alone being void. And this seems to be the generally received doctrine.[2]

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[1] *Sunnat-ul-Fatâwa*, p. 420

[2] *Fatâwa Kâ.i Khân*, Vol. II, p. 86

If a person were to make a dedication for a specific period of time, say, for a day, or a month, without any additional words, it would take effect as a lawful *wakf in perpetuity*. But if he were to say that it will be a *wakf* for a particular month, and on the expiry of that month, the *wakf* will be void—in such a case, the dedication would be void *ab initio*.

Contingent *wakf*.

If a man were to say "when to-morrow comes my land will become *sadakah-moukoofa*" or "when I become its *mâlik*, the land will be *wakf*," it is unlawful, for the creation of a *wakf* cannot be made dependent on the happening of a contingency.

If a person were to say, "my land will be *wakf* after my death for a certain number of years," it will take effect after the death of the declarant as a *wakf in perpetuity*.

If a man were to say, "my land is *sadakah-moukoofa* on this condition, that I shall have the power of revoking it whenever I chose," according to Hillâl, such a *wakf* is invalid. Yusuf ibn Khâlid, however, holds that the *wakf* is valid, and the condition void. And Abû Yusuf is of opinion that where the time for the exercise of the power is prolonged and undefined, the *wakf* itself is invalid.[1]

Similarly, if a man were to say, "I consecrate this land on the condition *that it remain my property*, and I shall have the power of selling it whenever I like, and of dedicating the proceeds thereof,"—such a *wakf* is invalid.

A conditional *wakf*.

When a *wakf* is created conditionally, it is valid, *e.g.*, if a person were to say, "this land is *wakf*, if it is mine," in that case if the land was his property at the time, it would constitute a valid *wakf*.

According to the Hanafîs, the *wakf* of property belonging to another is validated by the ratification of the real owner; not so according to the Shâfeïs.

Power of conversion reserved at time of dedication.

If a man were to say, "this land of mine is *moukoofa* for God in perpetuity on condition that I shall have the power to sell it, and with its price to buy another piece of land which will then become *wakf*, subject to the same incidents as the original *wakf*," both *wakf* and condition are valid according to Hillâl and Abû Yusuf. And this is correct.[2]

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[1] This view is adopted as law by the sect.

[2] *Radd-ul-Muhtâr*, Vol. III, p. 600.

The *wâkif* can alter the investment only when the power of sale has been expressly reserved. In the absence of any such power, the Kâzi, if he deem it expedient, may authorise the sale of the *wakf* property and a re-investment of the proceeds in any shape conducive to the proper maintenance of the *wakf*.[1]

Kâzi may authorise sale when advantageous for the *wakf*.

"The author of the *Manah* was asked regarding a house consecrated in favour of a mosque, whether it would be lawful for the Kâzi to direct its sale if he was of opinion that with the price thereof a piece of land may be purchased, which would bring considerably more profit to the *wakf*. The author of the *Manah* answered 'the question is for the Kâzi to decide judicially, so that if he considers deliberately that such sale and investment is to the benefit of the *wakf*, it is lawful,' and this is according to the opinion of Kâzi Imâm Abû Yusuf."[2]

"In the *Fatâwa's-Sirâjia* it is stated that when the sale or exchange of a *wakf* property is distinctly advantageous to the *wakf*, the Kâzi may direct it. For example, if no income is derived from the property, and somebody is anxious to purchase it, and in lieu thereof is willing to give such a land or house as would yield an income for the *wakf*, in such a case such exchange is authorised according to Abû Yusuf as well as Mohammed."

"Where the *wakf* property yields an income, but some person is desirous of exchanging it for another property yielding a much larger income, *e.g.*, if the *wakf* property is a *bazaar* situated in a lane and the person anxious to take it is willing to exchange it for a *bazaar* situated in a better place, in such a case, but not otherwise, the exchange is lawful according to Kâzi Abû Yusuf, &c.; on this is the practice."[3]

"In the commentary of Nâzim-Wahbâni it is stated upon the authority of the *Muhît* and Kâzi Khân, &c., that according to Imâm Mohammed the *mutwalli* is authorised to exchange for a better and more productive piece of land, the one dedicated if it has deteriorated in productive powers."

"In the *Tattima* it is reported from Hishâm and Mohammed that when a *wakf* [property] is in such a condition that the beneficiaries cannot derive benefit therefrom, the Kâzi is authorised

[1] *Radd-ul-Muhtâr*, Vol. III, p. 600. [2] *Surrat ul-Fatâwa*, pp 420—421.
[3] *Ibid.* p. 421.

to sell it and with its price to buy another, and this power nobody else can exercise excepting the Kâzi."[1]

"And in the *Siyar Kabîr* it is stated that though some jurists have held the change of *wakf* property not to be lawful, according to Abû Yusuf it is lawful; and in the *Muhît* it is stated that the following question was put to Shams-ul-Aimma Halwâni, 'whether when the *wakf* of a mosque [property consecrated to a mosque] becomes useless and cannot yield an income, the *mutwalli* can sell it and in its stead buy another?' He answered, 'yes, it would be lawful.' He was then asked, 'whether it would be lawful to do so when the property does yield an income, but with its price a better property can be purchased.' He answered, 'yes, it would be lawful.' Though some of the jurists hold against exchange or sale of *wakf* property, I have already stated that we conform to the rule laid down by Abû Yusuf."[2]

"If the *wâkif*", says the *Fath-ul-Kadîr*, "has made a condition to the effect that he would have the power of exchanging the land dedicated, and the land for which it is exchanged would become dedicated in place of the other, such a condition is valid according to Abû Yusuf, Hillâl and Khassâf, and this is *istehsân* (a liberal interpretation of the law)."

"If he has made a condition to the effect that the *mutwalli* should have the power of changing the investment during his (the *wâkif's*) own lifetime, the *mutwalli* will not have the power of making the change after the *wâkif's* death."

"In the *Fatâwa Kâzi Khân* it is stated that the rule laid down by Abû Yusuf and Hillâl is correct. So has Ansâri declared that such a condition is lawful, but it cannot be sold [by the *mutwalli*] without the sanction of the Judge. And when this matter is brought before the Judge, and it appears to him necessary for the benefit of the *wakf* (that the investment should be changed), he should give the sanction"....."A condition for the alteration of the investment is lawful according to Abû Yusuf, and *this is approved*, and in the *Fatâwa Kâzi Khân* it is stated that there is *Ijmaa or consensus* on the part of the universality of jurists on the lawfulness of a reservation of power to the *wâkif* to change

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[1] *Sunnat ul-Futâwa*, p. 421.

[2] *Ibid*, pp 422, 423

the investment, both condition and *wakf* being valid. Without such condition he will not have the power to make the change [unless authorised by the Kâzi.] In other words, if he has reserved the power at the time of dedication, by *consensus* he can exercise the power at any time himself; but when he has not reserved such power, then he must have recourse to the Kâzi for the necessary permission.....In *Mukhtasar-ul-Kudûri* it is stated the *nass* (Law) is on the rule laid down by Abû Yusuf."[1]

The general result of the authorities seems to be that the *wâkif* may lawfully change the *wakf* property, in other words, alter the investment provided he has reserved, at the time of dedication, power to that effect. Otherwise, no alteration can be effected without the leave of the Kâzi or Judge, who has the power to authorise a change of investment whenever he considers it beneficial for the *wakf*.

Among the conditions which the *wâkif* may lawfully make at the time of dedication is one which has already been given at another place, *viz.*, that the *wâkif* may provide for the payment of his debts with the income of the property.[2]

"In the Chapter on *Wakf* in the *Khazanat-ul-Fatâwa* it is stated that the Sâhib-i-Manah (the author of the *Manah*) was asked about a deed of *wakf* in which there was a condition to the effect that the *wilâyèt* of the trust should appertain only to the *wâkif's* male descendants, but now a deed has been discovered bearing a prior date, in which the *towliat* was given to his male as well as female descendants; the question was which deed should be acted upon [in regard to the *towliat*]. The Sâhib-i-Manah answered, if the *wâkif* in the first deed or at the time of dedication reserved to himself the power of altering any of the provisions regarding the management &c., of the *wakf*, in that case the second deed should be acted upon, that is, the deed in which the *towliat* is restricted to his male descendants. But if he reserved to himself in the original *wakf* no such power, in that case the first deed of *wakf*, *viz.*, in which there was no restriction, should be acted upon."[3]

"In the *Asaâf* it is stated that the *wâkif* cannot go beyond the conditions laid down at the time of dedication."

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[1] *Fath-ul-Kadîr*, Vol II, p. 639 [2] *Ibid*, p. 638.
[3] *Surat-ul-Fatâwa*, p 425.

"In the *Fawâid* it is stated from Khasâf that when there are two contradictory conditions made by a *wâkif*, the second is to be acted upon, unless it is beyond his powers."

When there are two contradictory provisions in a *wakfnamah*, the one which follows will be given effect to, according to "us," as the last condition overrides the first.

With reference to the principle that when there are two contradictory conditions in a *wakfnamah*, the second has effect given to it in preference to the first, the *Asaâf*[1] gives examples of it. For example, if in the beginning of the *wakfnamah* the *wâkif* declares that the subject-matter of the *wakf* shall not be "sold nor given in gift or become the property of anybody," and subsequent to that declares that it will be lawful for the *mutwalli* to sell the property, and with the proceeds thereof to purchase another property, which will be substituted for the original *wâkf*, in such a case the sale of the *wakf* will be valid, and the second condition will override the first. Or, if he were to say first, that the *mutwalli* may sell the *wakf* property and purchase something else in its stead and afterwards declare that it shall not be sold or given in gift, then it will not be sold. But, when the two conditions are not contradictory, and it is possible to give effect to both of them, then it will be incumbent to carry out both, for the conditions of the *wâkif* are like the *nass* (the Law). When there are general provisions and after them come the details, these (unless otherwise apparent on the document) will apply to the last condition, according to "us."

According to the Shâfeïs, these details refer to all the conditions, if the connection is with an "and" (*waw*); but only to the last condition, if the connection is with "then."

According to the *Zawâhir-uj-Jawâhir*, which is a commentary on the *Ashbâh-un-Nazâir*, the Kâzi has the power of associating a *mutwalli* with the one appointed by the *wâkif* even though the *wâkif* may have made a condition against it, should the Kâzi consider it would be beneficial for the trust to do so.[2]

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[1] The *Asaâf* is the work of Allâmah Burhânuddîn Ibrahim, Trâbulasi, (*i.e.*, of Tripoli.) Of this work Moulâna Mohammed Amin, the author of the *Radd-ul-Muhtâr*, speaks thus —"Should the exigencies of this world make it necessary for any individual to study the law of *wakf*, he should study the *Asaâf*, as it is the greatest authority on the subject."

[2] *Radd ul-Muhtâr*, Vol III, p. 602.

When the *mutwalli* or the *wâkif* consider it necessary or advantageous for the *wakf* to sell the property and invest the proceeds in some other property, or to exchange it for another property, he can only do so with the permission of the Kâzi learned in the law.[1] In the ordinances of Abû Saood, there is an order issued by the *Sadr-ush-shaṙâya* of the time, in the year 951 Hejira, declaring that no sale or exchange of *wakf* property should take place without an order of the Sultan (or his representative, the Judge.)

[1] *Radd-ul-Muhtâr*, Vol. III, p. 603.

CHAPTER XII.
THE GOVERNANCE OF THE WAKF.

SECTION I.

THE MUTWALLI.

"THE *wâkif* may lawfully reserve the *wilâyèt* (the management of the trust) for himself; this is according to Abû Yusuf; and Hillâl also has said the same. And the Sâhib-ul-Hadâya [the author of the *Hedâya*] states that this is the approved doctrine."[1]

"In the *Fatâwa Kâzi Khân* it is stated that, according to Mohammed as given in his *Siyar-Kabîr*, the *wâkif* will not be the trustee unless he has reserved the trusteeship for himself at the time of consecration; but according to Abû Yusuf consignment is not necessary in *wâkif*, so even when he does not [expressly] reserve the trusteeship for himself, he will still be the trustee. What I have stated is also laid down in the *Zakhîra* and *Tattima*,[2] and the Sâhib-ul-Hedâya has mentioned that this is the approved doctrine in our *Mazhab* (school)."[3]

"The *wâkif* is primarily entitled to appoint a *mutwalli* for the management of the trust. If he is honest and just, he has a title superior to that of the Kâzi to nominate a trustee, for though he has parted with the property, and his right in it has become extinguished, still he has a right to see that its proceeds are applied according to the terms of the consecration."

"He has a better title to appoint a *muezzin* and *imâm* for a mosque than the congregation, unless his appointment is objectionable on the ground that the persons nominated by him are unfit. So it is stated in the *Nawâzil* and Abu'l Lais says the *Fatwa* is thereon."[4]

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[1] *Fath-ul-Kadîr*, Vol II, p. 640. See *Doe dem Jaun Beebee* v. *Abdollah' Barber*, 1 Fulton's Reports, p. 345.

[2] Two works of great authority. [3] *Fath-ul-Kadîr*, Vol. II, p. 640.

[4] *Surrat-ul-Fatâwa*, p. 425.

Similarly, in the *Radd-ul-Muhtâr* :—It is lawful for the *wâkif* to reserve the *towliat* (the governance of the trust) for himself. And where a *wakf* has been created, but the *wâkif* has appointed no trustee or *mutwalli* for the administration of the *wakf*, nor has expressly reserved the *towliat* for himself, the office would nevertheless appertain to him *quâ wâkif*.[1]

Power of appointing the *mutwalli* rests primarily with the *wâkif*.

He has the power of appointing a *mutwalli* during his lifetime whenever he likes. Should he die without making any express appointment, the power devolves upon his executor. "If there is no executor, then the right of appointing a *mutwalli* is in the hands of the Judge."[2]

"If the *mutwalli* appointed by the *wâkif* dies in his lifetime, the power of appointing another *mutwalli* rests in the *wâkif* and not in the Kâzi."[3]

So also in the *Fusûl-i-Imâdia*. "In the *Sughra* it is stated that when the *mutwalli* is dead, and the *wâkif* is alive, the power of appointing another *mutwalli*, appertains to the *wâkif* and not to the Kâzi. And if the *wâkif* is dead, it appertains to his executor in preference to the Judge. But if the *wâkif* leave no executor, then the Kâzi is empowered to appoint a *mutwalli*. . . . So also in the *Khassâf*."[4]

Women eligible for a *towliat*.

Any person who is trustworthy and otherwise qualified to discharge the duties of the office may be appointed *mutwalli*. "In this respect men and women are alike," *i.e.*, a woman may be appointed a *mutwalli* in the same way as a man.[5] Sectarian and religious differences form no disqualification, and accordingly, the fact that a person is a Shiah does not disqualify him for the superintendence of a *wakf* made by a Sunni.[6] As long as a person can discharge the duties of the trust personally or through a deputy, he or she is qualified to hold the office of *towliat*.

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[1] *Radd-ul-Muhtâr*, Vol. III, p. 594. *Alamgiri*, Vol. II, p.—Comp. *Advocate-General* v. *Fatima Sultani Begum*, 9 Bom., H. C. R., p. 19.

[2] *Radd-ul-Muhtâr*, Vol. III, p. 594.

[3] *Surrat-al-Fatâwa*, p. 425.

[4] *Fusûl-i-Imâdia*, p. 237.

[5] *Radd-ul-Muhtâr*, Vol. III, p. 595; *Doe dem Jaun Beebee* v. *Abdollah Barber*, 1 Fulton Reports, p. 345; *M. S. Hyati Khanum* v. *M. S. Koolsum Khanum*, 1 Sel. Rep., p. 217; *Hussaini Bibi* v. *Hussan Sharif*, 4 Mad. H. C. R., p. 23.

[6] *Doyal Chund Mullick* v. *Syud Keramat Ali*, 16 W. R., p. 116. A person convicted of any ordinary offence, as defamation, abusive language, &c, is no considered unfit.

'The office of *mutwalli* is an office of personal trust, and a person who cannot discharge the duties of the trust personally, nor be responsible for their due discharge, cannot appoint a deputy.'[1]

But where the *mutwalli* has to perform religious duties or spiritual functions in connection with the *wakf*, which, as regards men, can only be performed by a man, a woman cannot be appointed to the office. For example, if the *mutwalli* is also the superior of a religious establishment, and, as such, has to officiate on occasions of religious festivals, a woman is precluded by her sex from holding the *towliat*.[2] Such superiors in India are called *sajjâda-nashîns*. [*Sajjâda* is the carpet on which prayers are offered ; and *nashîn* is the person seated thereon.] 'The *sajjâda-nashîn* is not only a *mutwalli* but also a spiritual preceptor. He is the curator of the *dargâh* where his ancestor lies buried, and in him is supposed to continue the spiritual line (*silsilla*). These *dargâhs* are the tombs of celebrated *dervishes*, who, in their lifetime, were regarded as saints. Some of these men had established *khânkâhs* where they lived, and their disciples congregated. Many of them never rose to the importance of a *khânkâh*, and when they died their *mausolea* became shrines or *dargâhs*. These *dervishes* professed esoteric doctrines and distinct systems of initiation. They were either *sufis* or the disciples of Mian Roushan Bayezid, who flourished about the time of Akbar, and who had founded an independent esoteric brotherhood, in which the chief occupied a peculiarly distinctive position. They called themselves *fakîrs* on the hypothesis that they had abjured the world, and were humble servitors of God ; by their followers they were honoured with the title of *shah* or king. Herklot gives a detailed account of the different brotherhoods and the rules of initiation in force among them. The preceptor is called the *pîr*, the disciple, the *murîd*. On the death of the *pîr* his successor assumes the privilege of initiating the disciples into the mysteries of *dervishism* or *sufiism*. The relationship which exists between a *pîr* and his *murîds*, as I understand the theory and practice of *dervishism*, is a spiritual and personal one.'

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[1] *Piran Bibi* v. *Abdul Karim*, I. L., 19 Cal., p. 203.

[2] 6 Sel. Reports, p 22

Accordingly, the appointment of a child of tender years as *sajjâda-nashîn* would seem to be opposed to the constitution of the office. There is one instance, however, in which a boy of nine or ten years of age was appointed a *sajjâda-nashîn* by the last holder of the office, the work of initiation, &c., during his minority, being entrusted to a disciple or *khalîfa* (vice-gerent). In this case the office was hereditary in the family, and apparently there was no other member qualified to perform the spiritual duties. 'The appointment of a *sajjâda-nashîn* of a *dargâh* must, to a large extent, however, be regulated by the practice followed in the particular *dargâh* or neighbouring *dargâhs*. Herklot describes the custom in vogue in the *dargâhs* existing in Southern India. And, so far as I am aware, that is consistent with the practice prevailing in other parts of India, *viz.*, that upon the death of the last incumbent, generally on the day of what is called the *sium* or *teja* ceremony (performed on the third day after his decease), the *fakîrs* and *murîds* of the *dargâh*, assisted by the heads of neighbouring *dargâhs*, instal a competent person on the *guddi*; generally the person chosen is the son of the deceased, or somebody nominated by him, for his nomination is supposed to carry the guarantee that the nominee knows the precepts which he is to communicate to the disciples. In some instances the nomination takes the shape of a formal installation by the electoral body, so to speak, during the lifetime of the incumbent. But in every case the person installed is supposed to be competent to initiate the *murîds* into the mysteries of the *tarikat* (*the holy path*).'

Similarly, if the *wakf* relates to an institution where services special to one sect or one religion are held, a member of another sect or creed would not be ordinarily appointed for the *towliat* of such an institution.

"A *mutwalli*," says the *Hâwi*, "can delegate the trust to another on his death-bed like an executor."

In the absence of any provision in the trust-deed as to the mode of succession, or of any evidence of usage, the *mutwalli* may, on his death-bed, nominate his successor, and such nomination will be valid without any judicial order. But in order that the nomination may be effective, it is necessary that the person so appointed should be adult and possessed of understanding. All the authorities are agreed that a minor cannot be lawfully appointed

a *mutwalli*. The *Fatâwa Alamgiri* lays down the principle thus:—

يشترط للصحة بلوغه وعقله كذا فى البحر الرائق

"And it is a condition to the validity (of the appointment of a *mutwalli*) that he should be adult and possessed of understanding; and thus it is stated in the *Bahr-ur-Râik*."

So also in the *Radd-ul-Muhtâr;* the conditions necessary to the validity [of the appointment] are puberty (*bulûgh*) and understanding (*akl*).

But when the office of *mutwalli* devolves upon a minor by virtue of a provision in the trust-deed, for example, if the *wakfnamah* provides that the *towliat* should be confined to the male descendants of the *wâkif* or the members of a particular family, and it happens that at some time the person on whom the office devolves by virtue of this provision is a minor, in such a case the appointment will remain in abeyance until he attains *majority*, when the *wilâyèt* (*mutwalliship*) would be transferred to him.[1]

So, also, when the *towliat* is hereditary in a family, and the last incumbent appoints his minor son on his death-bed to be the *mutwalli*, the Kâzi shall not remove him, but appoint another to discharge the duties of the office during his minority.

"In the *Anfaa-ul-Wasâil* it is written from the *Wakf* of Hillâl that if the *wâkif* has said thus, the *wilâyèt* is for my children, and leaves both adult and minor children, the Kâzi should appoint somebody in the place of the minors, or he may place the adult to represent the minors."

But a minor cannot be appointed by a *sanad* [of the Kâzi] whether he is appointed by himself or with another, for by his incapacity he is unable to superintend the affairs of the *wakf*, nor can he appoint a deputy in his place.

"If the *wâkif* appoints a minor as *mutwalli*, and no adult is associated with him, the Kâzi shall appoint some person to do the work until the minor attains majority. If there is an adult associated with the minor, the Kâzi may appoint some person to represent the minor and act jointly with the *co-mutwalli*, or may empower the adult *mutwalli* to act for the minor."[2]

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[1] *Radd-ul-Muhtâr*, Vol., III, p. 596.

[2] *Ibid*, p. 596.

Freedom and Islâm are not necessary conditions.[1]

"If the executor be a slave, then, according to both analogy and law, the appointment is valid, as the capacity to discharge the duties of the executorship or *mutwalliship* is not wanting in him. So, also, if a Zimmi or non-Moslem fellow-subject is appointed." But the Kâzi is entitled to remove them from their office, on the ground that from their position they are unable to discharge their duties satisfactorily.

So also in the *Fatawa-ul-Ankariwia* :—

"*Q.*—If the *wâkif* has made a *wakf* with this condition that its governance shall belong to his children ; and among his children are both major and minor, to whom is the *towliat* to be given ?

"*A.*—The Kâzi shall appoint somebody in place of the *saghîr*, and if he likes he may appoint the adult children as the *kâim-mukâm* or deputy of the minors."[2]

"If the *towliat* has been entrusted [by the *wâkif*] to a boy, his *towliat* would remain in abeyance [or ineffective] until he attains majority when the trust would be made over to him."[3]

"If the *wâikf* appoints as *mutwalli* a person who is absent, the Kâzi has the power of nominating in his place another for the time being, and when the *mutwalli* appointed by the *wâkif* arrives the trust will revert to him."[4]

When a person makes a *wakf*, and at the time of his death appoints a person to be his executor without mentioning anything about the *wakf*, such executor shall nevertheless be the *mutwalli* of the *wakf*.[5] If a person appoint an executor solely for the *wakf*, according to Abû Yusuf, he will be executor of the *wakf* alone, though according to Abû Hanîfa he will be an executor generally.

If the *wâkif* makes a condition at or before the delivery of the property to the *mutwalli*, that he reserves to himself the power of removing the *mutwalli* or changing the property, in that case he may do so, but not otherwise.

If a person make *wakf* a and appoint another as the *mutwalli* thereof, and also make it a condition that such *mutwalli* shall not

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[1] From the *Asaâf*.

[2] *Fatâwa-'l-Ankariwia*, Vol. II, p. 217.

[3] *Surrat-ul-Futâwa*.

[4] *Fatâwa-'l-Ankariwia*, Vol. II, p. 217, from the *Asaâf*.

[5] *Radd-ul-Muhtâr*, Vol. III, p. 593 ; *Fusûl-i-Imâdia*, p. 226.

have the power of appointing by *testament his successor, such condition* would be valid.[1]

If a man in health were to make a *wakf* of his land for the poor and consign the same to a *mutwalli*, and subsequently at the time of his death, were to tell his executor to give out of the produce of the land, certain shares to so-and-so, and to do whatever the executor thinks best with it, and the executor acts up to the *wâkif's* instructions it will not be valid, for the *wakf* was complete from the outset, and the *wâkif* had no power to make any alteration unless he reserved the power to himself.

If a person make a *wakf* during his lifetime, but do not appoint a *mutwalli* thereof even when death comes upon him, but appoint an executor, such executor will be the executor as well as the *mutwalli* of the *wakf*. This is according to Abû Yusuf and the *Fatwa* is according to him.

If, however, the *wâkif* appointed a *mutwalli* for the *wakf* during his lifetime, his executor will not be the *mutwalli* of the *wakf*.

SECTION II.

THE APPOINTMENT OF THE MUTWALLI.

The power of appointing a *mutwalli* rests primarily with the *wâkif* and, in his absence, rests with his *wasi* or executor, "*because he is the wâkif's locum tenens.*" An executor appointed only with reference to, or in respect of, the *wakf* properties would be a general executor, though Abû Yusuf apparently seems to differ in this view from the other jurists. According to the *Asaâf*, if a man were to appoint first a *mutwalli*, and then an executor (in respect of the same *wakf*,) both will be *mutwallis* unless their duties are specified.

Advocate General v. Fatima Begum.

In the case of the *Advocate-General* v. *Fatima Begum*,[2] it was held that, according to Mahommedan Law, the appropriator has a right to reserve the superintendence of the *wakf* to himself or appoint some one else. But when he has specified the class from whom the manager is to be selected, he cannot disregard his own trust-deed and appoint a person not answering the proper description he has indicated by the provisions of the *wakfnamah*, and his

[1] *Radd-ul-Muthâr*, Vol. III, p. 596; so also in the *Wajiz ul-Muhit*, see *post*.

[2] 9 Bom. H C. Reports, p 19.

right of nomination of the person to succeed to the management on his death must be confined to the class mentioned in the *wakfnamah*. This *dictum* must, however, be accepted with some qualification. If the *wâkif* at the time of dedication has reserved to himself the power of altering the class from whom the manager should be selected, his appointment of a person "not answering the description in the *wakfnamah*" will not be invalid. The term *akriba* though more properly confined to relations by blood, will, when the context shows that it was intended to be used in a wider sense, be so extended as to include relations by affinity, but the wife or widow of the founder is not included among his *akriba*.

Abû Yusuf holds that if a *wâkif* appoints a *mutwalli* during his lifetime, without mentioning that such appointment should continue in force after his death, the *mutwalli* would vacate his office on the death of the *wâkif*. The rule of law, however, is, that when an appointment is made without mentioning the time for which it is made, it would not fall to the ground on the death of the appointor.

In *Shah Ghulam Rahmutullah Sahib* v. *Mohammed Akber Saheb*,[1] the Madras High Court enunciated the recognised principle of Mahommedan Law, that when property is devoted to religious charitable purposes, it is usual for the appropriator to lay down rules, for succession to the office of trustee, and upon those rules, whether they are in writing or have to be inferred from evidence of usage, the question of succession depends. Should no rules be laid down, the power of appointing is vested in the appropriator during his life, and upon his death, it is vested in his executor; or, should he have left no executor, in the magistrate and sovereign power, that is to say, in the Court.[2]

When the *wâkif* has provided that the appointment to the *tawliat* shall be made by his children,—and among his children, there are some who are minors, the Kâzi may authorise those who are adults to

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[1] 8 Mad. H. C. R., p. 63.

[2] *Mohammed Sadik* v *Mohammed Ali*, 1 Sel Rep., p 17; *Mohammed Kessori* v. *Mohammed Shah Kiyamuddin*, 5 Sel. Rep., p 133; *Advocate-General* v. *Fatima Sultani Begum*, 9 Bom H C. R., p. 19; *Phate Sahib Bibi* v. *Damodar Premji*, I. L. R, 3 Bom, p. 84; *Agha Mahomed Ensoof Mushadee* v. *Abdool Hossain Khan*, S. D. A. 1857, p. 640; *Het Koonwar* v. *Chutterdharee Singh*, 13 W. R, 396.

make the appointment on behalf of the minors as well as their own, or may associate some person with them to represent the minors.

In the *Anfaa-ul-Wasâil* it is stated from *Khassâf*, that when a person has made a *wakf* of two pieces of land, and appointed two *mutwallis*, and subsequently at his death appoints Zaid as his executor, Zaid will be a *mutwalli* with them ; and if Zaid appoints Amr as his executor, Amr's position will be the same as that of Zaid.

If a person appoint two executors one after the other without removing the first, both of them become executors, for "among us," an executorship does not fall to the ground of itself. The appointment of a second *mutwalli* by the Kâzi is different from the appointment of a second *mutwalli* by the *wâkif*, for in the latter case both appointments are valid ; but when two appointments are made by the Kâzi, the second appointment invalidates the first provided the first *mutwalli* becomes aware of the second appointment. "It is not expedient to appoint to the office of *mutwalli* one who is a seeker after it, but it is not unlawful."

If the *wâkif* has appointed no *mutwalli*, and the Kâzi has appointed one, the *wâkif* has no power to remove the person appointed by the Kâzi.

When the *wâkif* dies without appointing a *mutwalli* or leaving an executor, in that case the Kâzi will have the power of appointing the superintendent of the *wakf ;* so also if the last incumbent in the office of *mutwalli* dies without appointing his successor or an executor, the appointment rests with the Kâzi ; the *Fatwa* is according to this principle and the Allâmah Kâsim has decided according to it.

The last *mutwalli* has the power of nominating his successor only when the *wâkif* has made no provision regarding to the office. If the *wâkif* has declared that the office shall descend in the lineal male line in a particular family, none of the incumbents will have the power of changing the course of descent. Or, if the *wâkif* has declared that after *A*, *B* should succeed to the office, *A* has no power to appoint *C*.[1]

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[1] 1 Sel. Reports, p. 17. *Jâmaa-ul-Fusûlain.*

As long as there is a relative of the *wâkif* qualified for the office, a stranger should not be appointed *mutwalli*,[1] for a relative is more benevolently disposed [towards the *wâkif*], and it is generally the intention of the *wâkif* that a relative should be appointed.

قوله ومادام احد يصلح للتولية من اقارب الواقف لايجعل المتولي من الاجانب ... المسئلة في كافي الحاكم ونصها ولا يجعل القيم فيه من الاجانب ما وجد في ولد الواقف واهل بيته من يصلح لذلك فان لم يجد فيهم من يصلح لذلك فجعله الى اجنبي ثم صار فيهم من يصلح له صرفه اليه اه ومفاده تقديم اولاد الواقف وان لم يكن الوقف عليهم بان كان على مسجد او غيره وفي الهندية عن التهذيب والافضل ان ينصب من اولاد الموقوف عليه واقاربه مادام يوجد احد منهم يصلح لذلك اه والظاهران مراده بالموقوف عليه من كان من اولاد الواقف فلا ينافي ماقبله ثم تعبيره بالافضل يفيد انه لونصب اجنبيا مع وجود من يصلح من اولاد الواقف يصح فافهم ولا ينافي ذلك مافي جامع الفصولين من انه لو شرط الواقف كون المتولي من اولاده واولادهم ليس للقاضي ان يولي غيرهم بلا خيانة ولو فعل لايصير متوليا لانه فيما اذا شرطه الواقف وكلا منا عند عدم الشرط ووقع قريبا من اواخر كتاب الوقف من الخيرية من مايفيد انه فهم عدم الصحة مطلقا كما هوالمتبادر من لفظ لايجعل فتامل. وافتى ايضا بان من كان من اهل الوقف لا يشترط كونه مستحقا بالفعل بل يكفي مستحقا بعد زوال المانع وهو ظاهر ثم لا يخفى ان تقديم من ذكر مشروط بقيام الاهلية فيه حتى لوكان خائنا يولى اجنبي حيث لم يوجد فيهم اهل لانه اذا كان الواقف نفسه يعزل بالخيانة فغيره بالاولى (كذبيه) قدمنا عن البيري عن حاوي الحصيري عن وقف الانصاري انه اذا لم يكن من يتولي الوقف من جيران الوقف وقرابته الا برزق ويقبل واحد من غيرهم بلا رزق فللقاضي ان ينظر الا صلح لاهل الوقف *

"This dictum is from Hâkim in the *Kâfi*, and he has made it *Nass* thus :—'So long as among the descendants of the *wâkif* or among the people of his family (*ahl-i-bait*) there is to be found

The right of members of the *wâkif's* family to the office of *tawliat*.

[1] 9 Bom. H. C. Reports, p. 19. *Radd-ul-Muhtâr*, Vol., III, p. 636.

any qualified [for the office] a *mutwalli* shall not be appointed from strangers. When, no qualified person is found among them, and the *towliat* is entrusted to a stranger, and subsequently a member of the *wâkif's* family is forthcoming who is qualified for the office, it shall be given to him.' The result of this is, that the descendants of the *wâkif* shall be preferred (for the office of *mutwalli*) even though the *wakf* may not be for them, as in the case of a *wakf* for a mosque or for others."

Similarly, it is laid down in the *Wajîz-ul-Muhît*: "So long as a descendant of the *wâkif* or a member of his *ahl-i-bait* (family) is living and is qualified for the *towliat*, the Kâzî should not appoint a stranger. If there is no one among his descendants or family qualified for the office then the Kâzi may appoint an outsider. But when after such appointment, a qualified person among them is forthcoming, the trust should be assigned to him." The principle is repeated in similar terms in the *Fatâwa'l-Ankarawia* and the *Fusûl-i-Imâdia* and the *Fatâwa Alamgiri*. The author of the *Radd-ul-Muhtâr* goes on to add :—

In the *Hindièh*[1] it is stated from the *Tuhzîb*, that when there is any one among the descendants or kindred of the *moukoof-alaih* qualified [for the office] it is preferable to appoint him. From the term *moukoof-alaih* are clearly meant the descendants of the *wâkif* [as the objects of the trust] and therefore this dictum is not contradictory of the one above [from the *Kâfi*.] Again, the use of the word "preferable," shows that the appointment of a stranger in the presence of a descendant of the *wâkif* is not invalid. This view is not contradictory of what is stated in the *Jâmaa-ul-Fusûlain*, which amounts to this, that should the *wâkif* make a condition to the effect that his children and children's children should be the *mutwallis* of the *wakf* in succession to each other, in that case the Kâzi has no power to appoint an outsider without finding any breach of trust on the part of the *wâkif's* descendant, and should the Kâzi appoint an outsider to the office of *mutwalli*, in supersession of a descendant of the *wâkif* without any lawful reason, such person shall not become *mutwalli*. This refers to a case where the *wâkif* has made such a condition, but the present discussion relates to a case where the

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[1] The *Alamgiri* is meant here.

wâkif has made no such provision. "And what is stated from the *Khairiyèh* at the end of the Chapter on *wakf* leads to the result that such an appointment [*i.e.* the appointment of a stranger] will be absolutely invalid, and this (no doubt) is the meaning of *lâ-ejaalo*, so this must be considered. And in the *Khairiyèh* there is also a *Fatwa* that it is not necessary for a person among the *ahl-ul-wakf* [people from among a *mutwalli* should be selected] to be qualified thus; if his disqualification is removed afterwards, it is sufficient [that is, he should then get the office.] And this is clear. [But] then it must not remain concealed, that all this relates primarily to a case where any of the descendants of the *wâkif* or his *ahl-i-bait* is found to be fit." It is only where the *wâkif* has made a condition that the office shall be confined to the members of his family that the Kâzi cannot appoint an outsider.

In the *Fusûl-i-Imâdia* it is stated that the author's father was asked whether, if the *wâkif* had made a condition that the *towliat* should be confined to his descendant, the Kâzi could appoint a stranger?—he answered, 'no.'

But even where there exists a condition to that effect, an outsider may be appointed, if there is no fit and proper person to be found among the descendants or relatives of the *wâkif*, and a descendant or relative of the *wâkif* succeeding to the office of *towliat*, if he proves himself unworthy or commits a breach of trust, can be removed, and, in the absence of any other member of the *wâkif's* family qualified to take his place, an outsider can be appointed, for when the *wâkif* himself can be removed for breach of trust, *a fortiori* other people can be removed also for misbehaviour. In a case where a descendant or relative or a neighbour of the *wâkif* is not willing to accept the office without a salary, and an outsider is willing to accept it without a salary, the Kâzi should see whose appointment would be most beneficial to the *wakf*, and who is fittest for the appointment.[1]

If an appointment has once been made validly, no other person can be appointed as long as the former appointment lasts.

A *mutwalli* cannot give up the office of *towliat* of his own motion; he must obtain the permission of the Kâzi to retire from his office. Some jurists have, no doubt, held that a *mutwalli* can resign his

[1] *Radd-ul-Muhtâr*, p. 636.

post in favour of another, but they have also held that the latter will not become *mutwalli* until his appointment has been sanctioned by the Kâzi, who is not bound to appoint him to the office.

If a *mutwalli* resigns his post in favour of another in lieu of some pecuniary consideration, and the latter is not appointed by the Kâzi, he can proceed against the quondam *mutwalli* for the money paid to him, though such "payment was illegal." Those who hold such payments to be legal are a few modern jurists, but it is against the true construction of the law and absolutely immoral.[1]

The appointment of the *mutwalli*.

It would appear, that at one time attempts were frequent on the part of the servitors of charitable endowments to discharge their duties by substitutes. The allowance fixed for the officers were drawn by them, whilst a small honorarium was given to their substitutes. The legality of such conduct seems to have given rise to considerable discussion among the early Mahommedan jurists; but the more modern lawyers are generally agreed in the opinion that the appointment of a substitute is not lawful unless there is any just reason for it. A female *mutwalli*, who is, by reason of her sex, unable to discharge all the duties of her office, is authorised to appoint a deputy. Similarly, where the disqualification is temporary, and is caused by illness or absence "on lawful grounds," the work may be performed by a substitute appointed by the superintendent or the Kâzi. Where such appointment is made, the substitute is entitled either to the whole allowance or a portion thereof, in accordance with the arrangement made between him and the incumbent. Ibn Shibli has stated in his *Fatâwa*, that when a *mutwalli* has become incapable from weakness to superintend the work personally, he may appoint a substitute or deputy to help him in the management, but the responsibility would continue to rest with him, and the substitute will only obtain his allowance from the *mutwalli*. The *mutwalli* cannot, however, assign or transfer the office to any one, or appoint another during his lifetime, unless his own powers are "general."[2]

[1] See *Shah Mohiuuadin* v. *Elahee Buksh*, 6 W. R. 277.

[2] *Radd-ul-Muhtâr*, Vol, III, p. 637. In the case of *Wajid Ali* v *Ashraf Hossain*, 10 C. L. R., p. 529, the meaning of the word "general" was not considered at all.

Should the *mutwalli* in his lifetime and in health appoint another in his place, the appointment will be lawful and valid, if the *mutwalli* has obtained the *towliat* with that condition "in a general manner." In that case the *mutwalli* so appointing another person in his place will not be able to remove the latter, unless the *wâkif*, whilst confiding the trust, empowered him to assign the trust to another, and also to remove the trustee.

As regards the appointment by the *mutwalli* of a *kâim mokâm* or substitute in his place, the restriction mentioned above refers to the appointment of a permanent and substantive substitute, who would occupy the position and exercise the full powers of the *mutwalli*, in fact succeed him in the office. Such an appointment can only be made by the *mutwalli* on his death-bed or in death-illness.[1] 'This restriction does not apply to the appointment of a deputy or agent.' And in the *Fath*[*-ul-Kadîr*] it is stated that the *mutwalli* is empowered to appoint such persons as deputies, as are able to discharge the duties connected with the office, or which are incumbent on the *mutwalli*. The *mutwalli* has the power of removing his deputy and appointing another in his place. If the *mutwalli* becomes insane, the appointment of his deputy becomes vacated of itself; and the Kâzi becomes entitled to appoint a substitute for the *mutwalli*. This applies to all cases, both where the *mutwalli* has been appointed by the Kâzi and by the *wâkif*.

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[1] قوله اراد المتولي اقامة غيره مقامه - اي بطريق الاستقلال اما بطريق التوكيل فلا يتقيد بمرض الموت وفي الفتح للناظران يوكل من يقوم بما كان اليه من امر الوقف و يجعل له من جعله شيئا وله ان يعزله ويستبدل ولوجن العزل وكيله ويرجع الى القاضي في النصب صحته و شمل كلام المصنف المتولي من جهة القاضي او الواقف كما في الفع الوسائل عن التتمة وقال وهوا عم من قوله في القنية المتولي ان يفوض فيما فوض اليه ان عمم لقاضي التفويض اليه والا فلا فان ظاهره ان هذا الحكم في المتولي من جهة القاضي فقط (قوله والصحة) عطف تفسير اراد به بيان ان المراد بالحياة ماقابل المرض وهوا لاما يشملهما فافهم وقوله ان كان التفويض له بالشرط عاما صح *

Where the appointment of the *mutwalli* is "general" the *mutwalli* has the power of assigning the trust to another, not otherwise.[1]

Meaning of the term "general."

As regards the meaning of the term "general," the author states as follows. "It means that if the *wâkif* or Kâzi make a condition, at the time of appointing the *mutwalli*, that he should have the power of transferring the trust to another and substituting that other in his own place, by a *sanad-i-wakf* or *wasiat*, should necessity arise for it, such a condition would carry with it the power, on the part of the *mutwalli*, to appoint another *mutwalli* during his lifetime,[2] or in death-illness."

When he has once exercised the power, he cannot cancel the appointment.[3] If the appointment of the *mutwalli*, or the assignment to him of the trust, is not على سبيل التعميم or general in its nature as stated above, in other words, when the *mutwalli* does not possess general powers, he cannot assign the trust to another "in health," whilst capable of discharging the functions of the office; but [if there are no provisions in the *wakfnamah* regulating the mode

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[1] In the *Alamgirí* the principle is given thus:—"A superintendent may at his death commit his office to another in the same way as an executor may commit his to another. But when the appropriator has assigned some particular property for the superintendent, it does not belong to the person to whom the office has been bequeathed; and the matter must be submitted to the Judge in order that he may assign for him the hire or salary of similar work, unless the appropriator had assigned the allowance for every superintendent. A superintendent, while alive and in good health, cannot lawfully appoint another to act for him, unless the appointment of him were in the nature of a general trust."

[2] *Radd-ul-Muhtâr*, Vol III, p 637.

[3] قوله لا يملك عزله الخ - هذا ذكره الطرسوسي بحثا وقال بخلاف الواقف فان له عزل القيم وان لم يشرطه والقيم لا يملكه كالوكيل انما اذن له الموكل في ان يوكل فوكل حيث لم يملك العزل وكالقاضي انما اذن له السلطان في الاستخلاف فاستخلف شخصا لا يملك عزله الا ان شرط له السلطان العزل واطال في ذلك فراجعه ان شئت (قوله والا) اي وان لم يكن التفويض له عاما لا يصح وقوله فان فوض في صحته الاولي حذفه لان الكلام في الصحة وحينئذ فقوله وان في مرض موته مقابل لقوله

of succession,] he can appoint a successor in death-illness.[1] The reason of this is stated by Kâzi Khân to consist in the fact that the *mutwalli* is in the position of an executor, and like an executor he has the power of appointing on his death-bed another executor in his place to perform the functions which appertain to him. As an executor has no power to resign the executorship which he has once accepted, without the permission of the Kâzi, so a *mutwalli* cannot withdraw from a trust without such permission. The appointment of another *mutwalli* by one who does not possess general powers, without the leave of the Kâzi, is tantamount to a withdrawal of the incumbent from office, yet he remains responsible, unless the appointment or transfer of the trust is subsequently confirmed by the Kâzi.

"With reference to a *mutwalli* appointed in a general manner," says the *Radd-ul-Muhtâr*, "the meaning of the term بالتعميم 'general' is thus explained in the *Anfaa-ul-Wasâil* :—'that the *wâkif* appoints a *mutwalli* and places him in his own place and constitutes him his successor, and authorises him to assign the trust to whomsoever he likes, in such a case the *mutwalli* can transfer the trust either in health or death-illness.'[2]

"If the *Nazir*, without the condition, during *Marz-ul-Mout* entrusts the *towliat* to another, it is valid ; but if he assigned it in health, it would not be valid, as is stated in the *Tattima*, &c., and the reason of this is, that he is in the position of an executor, . . .

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[1] في حياته و انما صح اذا فوض في مرض موته و ان لم يكن التفويض له عاما لما في الخانيه من انه بمنزله الوصي و للوصي ان يوصي الى غيره و سنذكر الشارح في كتاب الاقرار عن الاشباه الفعل في المرض احط رتبه من الفعل في الصحة الا في مسئلة استئنار الناظر لغيره بلا شرط فانه في مرض الموت صحيح لا في الصحه كما في التتمه و غيرها ووجهه ما علمته من انه بمنزله الوصي ولما كان الوصي له عزل من اوصى اليه ونصب غيره اتجه قوله وينبغي ان يكون له العزل و التفويض كالا يصاء بخلاف الاستئنار في حال الصحة لانه في حال الصحة كالوكيل ولا يملك الوكيل العزل *

[2] Taken from the *Anfaa-ul-Wasâil*.

and as an executor can assign the executorship by testament, a *mutwalli* may also do so. And it is right to hold that the powers of a *kyyim* and executor are co-extensive. And this is different from an act done in health, for a *kyyim* in health is like a deputy (*vakîl*) and a *vakîl* has no power of delegating his powers."

With reference to this subject, the *Surrat-ul-Fatâwa* is distinct. "If the *wâkif* has provided that the *mutwalli* should have the power of assigning the trust to another, in such a case an assignment of the *towliat* whilst the *mutwalli* is in health is valid, otherwise not. But even without such power, if the assignment is made in *Marz-ul-Mout* it is valid; so it is stated in the *Kinia* and *Tattima*. And if the *mutwalli* has once appointed another in his place by virtue of the power reserved to him by the *wâkif*, he cannot remove the person so appointed, unless the *wâkif* gave him the power of appointing as well as discharging. Tartûsî in his *Anfaa-ul-Wasâil* has laid down the same rule . . . I was asked with reference to a *mutwalli* who had been appointed by his predecessor by virtue of the power given to the latter, and who had died leaving the trust in the hands of a third person, whether the *hâkim* could give the *towliat* to somebody else. I answered that if the *mutwalli* had assigned the trust *in health*, the appointee will hold the trust for the lifetime of the *appointor*; but upon his decease the Kâzi will have the power of appointing."[1]

I take it that this refers to a case where the *mutwalli*, who had been appointed by virtue of a power given to his predecessor by the *wâkif*, did not possess the power himself also; in other words, if the power was only personal to the first *mutwalli*. But whether he had the power or not, if he appointed a successor on his death-bed it would be lawful.[2]

If the *wâkif* on his death-bed was to say to another, "You shall be in my place with reference to this *wakf*," or if he was to say that "my children will have the same powers as myself with respect of this *wakf*," this in fact would be vesting them with all the powers he possesses. And I take it that in such cases the executor of the *wâkif*'s children will have the power of appointing a *mutwalli inter vivos*. This question was not considered properly in the case of *Ashraf Hossein* v. *Wajid Ali*.[3]

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[1] *Surrat-ul-Fatâwa*, p. 440. [2] *Ibid*. [3] 10 Cal. L. R., 529.

"But the *wâkif* may condition that so and so is the *mutwalli* of this *wakf*, but that that he will not have the power of leaving the the trust by *wasiat* to another, such condition is lawful."[1]

"The *wâkif* may lawfully condition that so-and-so will be the *mutwalli* of the *wakf*, but that neither he nor any other *mutwalli* shall have the power of leaving the trust by *wasiat* to another."[2]

When a condition is made in the *wakfnamah* that upon the death of each *mutwalli*, the power of appointing his successor will rest with the Judge, a *mutwalli* cannot appoint a successor to himself either in health or illness. And upon the decease of each incumbent, the Kâzi shall appoint a successor.

The *wâkif* has the power of removing the *mutwalli* only when he has reserved a power to that effect, and the *Fatwa* is according to this rule.[3]

The *wâkif* may give the power to the *mutwalli* to increase or reduce the allowance of the *wazifadars* according to his discretion, or to remove or add to the *wazifadars*.

If a person make a *wakf* and appoint Abdullah the *mutwalli* thereof, and declare that upon Abdullah's death, Zaid shall be the *mutwalli*, Abdullah has no power to devise the *mutwallishîp* to another, and Zaid will be the *mutwalli*, notwithstanding any appointment made by Abdullah. And Allâmah al-Hanouti has held that when a person has declared that the *towliat* of any *wakf* should be given to the "most discreet of his descendants ; and one of them, being the *mutwalli* for the time, appoints his son-in-law as the *mutwalli* and dies, the *towliat* shall nevertheless go to such person among the descendants of the *wâkif* as fulfils the condition in the *wakfnamah*." Any appointment contrary to the terms of the *wakf*, or conditions laid down by the *wâkif* are invalid. There is no authority to show that the servitors of the mosque can remove

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[1] *Wajîz-ul-Muhît.* [2] *Ibid.*

[3] *Radd-ul-Muhtâr*, Vol. III, p. 638. There is a difference between Abû Yusuf and Mohammed on this point. Abû Yusuf holds that the *wâkif* is absolutely entitled to remove the *mutwalli* appointed by himself, whether he has reserved the power or not. Mohammed differs, holding that it is only when the *wâkif* has reserved the power that he can remove the *mutwalli*, without any misfeasance, and the *Fatwa* is according to Mohammed's view ; *Tashih-ul-Kûduri* by Allâmah al-Kâsim ; see the case of *Hidayatunnissa* v. *Afzal Hussain*, 2 N.-W. P. Rep., p. 420.

the *mutwalli*, though the *mutwalli* can remove them for unfitness or misconduct or any fault.[1]

Should a *wâkif* appoint a *wasi* at the time of his death and mention nothing about the provisions of the *wakf*, the *wasi* will become the *mutwalli* until he appoints another to discharge the duties of the *tawliat*.

An executor appointed by the Kâzi occupies the same position as one appointed by the deceased, except in certain matters.

A derivative executor occupies the same position as the executor of the testator.[2]

According to Abû Yusuf if a *wasi* is appointed for a *wakf*, the *wasi's* functions are restricted to the *wakf;* and Hillâl agrees with Abû Yusuf. This view is stated in *Fatâwa Kâzi Khân*, and it is also stated that Abû Hanîfa agrees with Abû Yusuf. Mohammed differs, and his opinion on this point seems to be generally in force.

"If a person appoint a *mutwalli* and then appoint an executor, both will become *mutwallis* thereof, unless the functions are distinctly specified." In the *Asaâf*, the mode of specifying the functions is stated in this manner :—"The *wâkif* says his such a land is *wakf* and so-and-so is the *mutwalli* thereof, and, as regards all the rest of his property, so-and-so is the *wasi*. In such a case both the persons appointed have separate functions."

"In the *Fatâwa Kâzi Khân* it is stated that if the *wâkif* has appointed two persons to be *mutwallis* after his death, and if one of them dies appointing the other as his executor in the matter of the *wakf*, the survivor would be entitled to act as the sole *mutwalli*."

In the *Fatâwa Kâzi Khân* it is stated that in early times there was great difference of opinion among the jurists whether the *Ahl-i-masjid*[3] could, upon the decease of the *mutwalli* of the mosque, appoint another *mutwalli* in his place without the order of the Kâzi. It was generally considered that such appointment would not be valid, although the person so appointed, if he has discharged any duties connected with the trust and incurred lawful expenditure, will not be liable for the same.[4]

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[1] *Radd-ul-Muhtâr*, Vol III, p. 639.

[2] After the *Zâhir-ur-Rawâyèt* and *Tâtâr Khânièh*.

[3] *Radd-ul-Muhtâr*, Vol. III, p 633. [4] *Futh-ul-Kadîr*, Vol. II, p. 640.

"But when there is a *wakf* in favour of specific individuals limited in number, an appointment made by them unanimously of a proper person would be valid without the order of the Kâzi, but it is preferable to lay the matter before the Kâzi to appoint a man whom he considers fittest for the post. The (modern) jurists hold that in these times it is not necessary to apply to the Kâzi for sanctioning the appointment of *mutwalli*, as the Kâzis of our times have proved themselves not trustworthy. Nevertheless, the congregation of the mosque ought not to appoint a *mutwalli*, without informing the Kâzi and obtaining his sanction to the appointment."

The author of the *Radd-ul-Muhtâr*, says, "the result of what is stated in the *Tâtâr Khânieh* is this that if the devotees or congregation of a mosque agree in appointing a *mutwalli*, for the good of the mosque it is valid according to the ancient jurists, but it is preferable to obtain the sanction of the Kâzi. The moderns are, however, unanimously of opinion that 'in these days' it is preferable not to inform the Kâzi, for it is known how covetous they are of the property of *wakfs*. In the same way, when a *wakf* is in favour of known individuals or a limited class of people, they are entitled, if they are *sâleh* (pious) and qualified to do so, to appoint a manager."

As I understand the principle, the *dicta* which prohibit the appointment of a *mutwalli* by the congregation, refer to endowments of a public nature like a *masjid-i-jâmma* and similar institutions in which the public at large or the Mussulman public generally are interested. But when an institution is dedicated to the inhabitants of a particular locality, or to a particular sect or fraternity, the number of which is ascertainable, the modern Moslem jurists have recognised the validity of an appointment by the congregation. The *Fatâwa Alamgiri* after stating the ancient views concerning such appointments says :—

"It is stated from Shaikh-ul-Islâm Abu'l Hassan that all the *mashâikhs* (jurists) declare that if they (the congregation) do appoint a *mutwalli*, it would be as valid as if the appointment was made with the permission of the Kâzi."

The same principle is given in the *Radd-ul-Muhtâr* and the *Wajiz-ul-Muhit*.

If the *wâkif* appoints a *mutwalli*, but there is no indication that the appointment should continue in force even after his (the *wâkif's*)

death, the *mutwalli* would be discharged upon the happening of the *wâkif's* death.

The *Radd-ul-Muhtâr* states the principle thus :—When a *mutwalli* is appointed by the *wâkif*, he will become discharged on the death of the *wâkif*. This is according to Abû Yusuf's rule on which is the *Fatwa*, for such a *mutwalli* is merely an agent on behalf of the *wâkif*. But when the *wâkif* appoints a *mutwalli* for his life and after his death, such *mutwalli* will not become discharged in consequence of the *wâkif's* death.

When the *wâkif* himself holds the office of *mutwalli*, and is found guilty of misfeasance or breach of trust, he can be removed, whether there is a condition to that effect in the *wakfnamah* or not. Unfitness to carry out the duties of the trust is a cause for removal from office.

"If the *wâkif* has reserved the *wilâyèt* in his own hands, and he proves himself dishonest, the Kâzi has the power of removing him in the interests of the *cestuis qui trustent*, just in the same way as he has the power of removing a dishonest executor."[1]

A fortiori he has the power of removing a *mutwalli* for breach of trust, and he may do so even though the appropriator should have made a condition that there should be no such power.

But the malversation or breach of trust must be proved ; mere imputation is not sufficient to justify his removal. If a *mutwalli* with funds in his hands neglects to repair the *wakf* premises and allows it to fall into disrepair, it amounts to a breach of trust, for if he knowingly and intentionally causes damage or loss to the *wakf*, or if he misdeals with the trust property he must be removed from his office.

The *Fath-ul-Kadir* is very distinct on the point. "The Kâzi has the power of doing so even if the *wâkif* has made a condition to the effect that in case of breach of trust on his part, neither the Kâzi nor the Sultan will have the power of removing him."[2]

In the *Jâmaa-ul-Fusûlain*, it is stated that "when a *mutwalli* has been appointed by the *wâkif* or by any of the constituted judges, he cannot be removed without any of those causes which justify his removal, that is, manifest breach of trust or misfeasance and

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[1] *Radd-ul-Muhtâr*, Vol. III, p. 596 ; *Surrat-ul-Fatâwa*, p. 420.

[2] *Fath-ul-Kadir*, Vol II, p. 640.

the like causes. In the terms 'like causes' appear to be included in capacity to discharge the duties of the office as well as immorality."[1]

The Kâzi cannot remove a *mutwalli*, whether appointed by the *wâkif* or himself, merely on the complaint of the beneficiaries, but can do so upon proof of misfeasance or breach of trust.[2]

The dismissal of the *mutwalli*.

But though the Kâzi has no power to remove the *mutwalli* merely upon the complaint of the beneficiaries, yet upon receiving a complaint, if he consider the complaint to be *bonâ fide* and reasonable, he can associate another trustworthy person with the *mutwalli* and fix a remuneration for him, either out of the allowance of the *mutwalli* or from the general funds.

Similarly, the Kâzi has no power to remove an executor appointed by the deceased merely on the complaint of anybody without proof.

Responsibility of the *mutwalli*.

Any loss sustained by the *wakf* through the wilful neglect of the *mutwalli* shall be made good by him. It is doubtful, however, whether a gratuitous *mutwalli* would be liable for any loss which is occasioned merely through neglect to the *wakf*.

"The *mutwalli*," says the *Fath-ul-Kadîr*, "is also liable to be removed if he is proved to be addicted to drunkenness and such like vices."[3]

If a *mutwalli* takes up his abode in the *wakf* building without any provision to that effect in the deed of dedication, or without the permission of the Judge, his conduct amounts to misfeasance.

The *mutwalli* should ordinarily be chosen from among the relatives of the *wâkif*. If, among his relatives or neighbours, no person can be found willing to undertake the work of *towliat* without a remuneration, and there is an outsider willing to do so, then his appointment would depend upon the Kâzi's discretion, and he must judge who is the best person to be appointed.[4]

Persons who get an allowance from the *wakf* shall not be deprived of their *wazifa*, unless they are proved to be guilty of some offence which entails this penalty.[5]

An attempt to "sell" or alienate the allowance or to create a charge upon it has been regarded as misconduct sufficient to pass

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[1] *Radd ul-Muhtâr*, Vol. III, p 597.

[2] *Jâmaa-ul-Fusûlain*, *Radd-ul-Muhtâr*, Vol III, p 597.

[3] *Radd-ul-Muhtâr*, Vol. III, p. 640. [4] *Ibid*, p 597. [5] *Ibid*.

the *wazifa* or allowance, if hereditary, to the children of the *wazifadar*. Upon this principle, the insolvency of the *wazifadar* would lead to the same result.[1]

If a person who is allowed to reside in the *hujra* or a room of the mosque either in lieu of his services or in addition to his salary, lets it without permission of the *mutwalli*, he renders himself liable to dismissal.

When an allowance is fixed for a person in the *wakfnamah*, and it is declared that upon his death such allowance shall go to another, if the person for whom the allowance is fixed assigns his interest to a third person, upon the decease of the original beneficiary, the allowance shall go to the person appointed by the *wâkif*, and not to the assignee of the original beneficiary.[2]

No beneficiary is entitled to substitute another in his place, but he may appoint another person to receive his allowance.[3]

A student who has been absent for three months may not be deprived of his room and allowance on account of his absence alone.

In the *Ashbâh* it is laid down that if the sovereign himself were to appoint a person as a teacher who is not competent, he may be removed, *for the act of the Sultan must not be unreasonable or improper*. "A king appointing an incompetent person," says the *Bazâziah*, "does two wrongs, first, that by appointing an incompetent person, he does an injustice to a competent person; and second, that he does an injustice to the public by appointing one who was not entitled to the office."

"In the *Fath-ul-Kadîr* it is laid down that when a *mutwalli* becomes totally insane, and the insanity lasts for a year, he will become discharged of himself; but when he recovers, he will get back the *towliat*. The *Nahr* says on this point that he will get back the appointment only in case the *mutwalli* is one who holds the appointment by virtue of the provisions of the deed of *wakf*; but this rule does not apply to a *mutwalli* appointed by the Kâzi." In other words, insanity will lead to his removal, but he will not get back the post on recovery.

"But if the *mutwalli* is trustworthy and has not been proved to be guilty of any fault, he cannot be removed even by the Sultan."

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[1] *Radd-ul-Muhtâr*, Vol III, p 597. [2] *Ibid.* [3] *Ibid.*

"When a *mutwalli* has been lawfully appointed by the Kâzi, and subsequent thereto the Sultan appoints another, the former appointment will take effect and not the latter."

"If the *wâkif* has empowered the *mutwalli* to appoint a successor, the Kâzi has no power to interfere with an appointment made in virtue of that authority, and the *Fatwa* is on this."

"In the Book on *Wakfs* by Nâsihi it is stated that where a *wakf* is created in favour of a body of people, and the *mutwalli* does not or cannot fulfil the provisions made by the *wâkif* for the benefit of the *cestuis qui trustent*, he ought to be removed and another appointed in his place."[1]

The person who builds the mosque has a better title to appoint its *muezzin* and *imâm* than the congregation, but should the congregation appoint a better and more qualified person, their appointment would be preferred.

In the absence of a *mutwalli*, the power of nomination and appointment of an *imâm* and *muezzin* to a mosque, is given to the *wâkif*'s descendants and the members of his family, preferentially to others. This is the view stated in the *Ashbâh*.

In the matter of building and repairing a mosque the person who has erected the mosque, and his descendants, are preferred to the congregation or outsiders. This is according to the *Anfaa-ul-Wasâil*.

If the *wâkif* makes a condition that the administration should devolve on "the most intelligent" رشد it implies the most intelligent among his descendants; and according to a *Fatwa* of Moulana Abû Saood, if there are two of them equally intelligent, they both should be associated together in the office. In the *Nahr*,[2] however, it is stated from the *Asaâf* that if the *wâkif* has declared that the *towliat* should be for the most qualified فضل among his children, and there are two equally qualified, the *towliat* shall go to the one who is the oldest in age, and in this there will be no distinction of sex. And if among the two, one is very pious and the other is

[1] The author adds that if the *mutwalli* is addicted to *alchemy*, that is a desire to convert a baser metal into gold he should be removed, for this avarice would "lead to breach of trust." Generally, the purport of this passage is that if the *mutwalli* is given to gambling or habits of a kind which might be prejudicial to the interest of the *wakf* he should be removed.

[2] *Nahr-i-Fâik*.

best acquainted with the affairs of the *wakf* and its management, the *towliat* should be given to the latter, if he is trustworthy. The author of the *Radd-ul-Muhtâr* adds that the *dictum* in the *Nahr* particularises the view of Abû Saood, for it declares that when excellence is required to be joined with intelligence, and there are two equally intelligent and virtuous, regard is to be paid to age. And, according to the *Bahr* (after the *Zahiria*,) if all the descendants are equal in integrity and piety, in learning and uprightness and age, the one who is best acquainted with the affairs of the *wakf* and is most capable to discharge the duties connected with the trust, whether male or female, is to be preferred. According to the *Bahr*, *rushd* or intelligence refers to the ability to perform the work and honestly to discharge the duties of the office.[1] In the *Asaâf* also, it is stated that when two of the descendants are equally qualified, so far as the qualities of the mind are concerned, the *towliat* will go according to seniority ; and the fact that one is a male and the other a female will make no difference. But the person best acquainted with the business of the *wakf* will be preferred, though in the *Fatâwa-al-Ismailia* there is a *dictum* to the effect that where two people are equally qualified in all respects a male is to be preferred to a female.

When the *wâkif* declares that the *towliat* should be vested in the "fittest" among his children, and there is no fit person to be found among them, the Kâzi has the power to appoint a stranger to the office until such time as a proper person among the *wâkif's* descendants can be found. If among the children there is a properly qualified person and he is absent, and there is no one else among them to take his place until his return, the Kâzi has the power to appoint a stranger to be his substitute until he returns to take the office. If there are two children, one more qualified than the other, the one who is the fitter of the two should take the office, and after him should come the other.[2]

The words *nâzir*, *kyyim* and *mutwalli* used separately, convey one and the same meaning, *viz.*, the administrator of a trust.[3] But it

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[1] *Radd-ul-Muhtâr*, Vol III, p. 666.

[2] *Ibid;* the same principles are given in the *Fatâwa-'l-Anhariwia*, &c. Fitness includes piety (ع) says the *Fusûl-i-Imâdia*.

[3] *Radd-ul-Muhtâr*, Vol, III, p. 667.

often happens that at the time of appointing a *mutwalli*, the *wâkif* also appoints a *nâzir*, a supervisor over the *mutwalli*. In that case, the *nâzir* has no power over the disbursements, but his duties would be simply of a controlling and supervising character, and the *mutwalli* shall not make disbursements without the knowledge or permission of the *nâzir*. The same principle applies to a *nâzir* appointed over an executor; as a matter of fact, the principles which apply to the duties of *mutwallis* and *nâzirs* in the case of *wakfs* are taken from the principles of the law relating to the duties of executors.

A supervisor is not entitled to spend any portion of the money of the *wakf*, for that work is entrusted to the *mutwalli*; and the supervisor's duty is to superintend and protect the interests of the *wakf*.

The builder of a mosque is the person who has a preferential title to appoint the officers, such as *imâm*, *muezzin*, &c., for the service thereof, and this is the approved doctrine. If the person appointed by the *wâkif* is incompetent or unfit, the congregation have a right to select a more fit person.

Property purchased by the *mutwalli* out of the *wakf* funds becomes *wakf* without any express declaration, subject to the same conditions as the original trust-property. But it may be sold or exchanged for some other property, in case there is any need for it, and such other property would be *wakf* similarly.

The salaries of the *imâm*, *khatîb*, *muezzin*, &c., which have already become due, will be paid on the death of any one of them to their heirs. In the case of *wakfs* in favour of children, the heirs of the deceased beneficiaries are entitled to share in the rents and profits, which have been realised and are therefore distributable, or which are accruing.

If a student absents himself from the madrassa, he does not lose his former allowance which has already accrued due, nor his future allowance, if he has absented himself in the pursuit of learning (without severing his connection with his madrassa and with the permission of his master,) or has been absent for fifteen days only on lawful grounds, that is, in search of livelihood; or has gone on *hajj*, but has not been away for more than three months.

Leave is allowed to the servitors of a *wakf* on lawful grounds, and they do not lose their allowance whilst on leave unless a deputy is appointed to officiate for them during their absence.

The Kâzi has no power to fix allowances not provided for by the *wâkif*, but he can determine the amount of the allowances provided for by the *wâkif*. If there is a provision that the *mutwalli* should fix the amount, the Kâzi has no power. The Khair-ur-Ramli has stated in his commentary[1] on the *Bahr*, that the restriction on the powers of the Kâzi refers to a case where the *wâkif* has expressly stated that the *wakf* is not public in its nature, and the Kâzi shall have no authority over it. "This, of course, refers to *wakfs* created by private individuals. Royal *wakfs* are clearly subject to the jurisdiction of the Kâzi."

Powers of the Judge to increase salaries of officers.

In fixing the salary of the *mutwalli*, regard should be paid by the Kâzi to the customary allowance at the time, but it should not exceed one-tenth of the income. "Of course," the *wâkif* can fix any amount, and even if it is more than one-tenth it would be valid; but if he fixes too low a sum, the Kâzi has the power upon the application of the *mutwalli* to fix a proper salary.

The *mutwalli* has no power to increase the allowance of the *imâm* or *khatîb*. The Kâzi has the power to increase the allowance, provided in his discretion it is necessary to do so for the benefit of the mosque, or when it is impossible to obtain a proper man to discharge the duties on account of the low salary fixed by the *wâkif*. And this principle applies to the appointment of every servant *e.g.*, a *muezzin*, *muddaris*, &c. If these men cannot be had on the salaries fixed by the *wâkif*, the Judge has the power of increasing their salaries from the balance of the fund. The Kâzi has the power of making provisions regarding the application of the balance of the income, in consultation with the members of the grantor's family or the beneficiaries.

If a person is appointed *mutwalli* and he acknowledges another to be the *mutwalli* instead of himself, the latter will be entitled only to a share in the income of the acknowledgor during his lifetime. Upon the death of the acknowledgor the effect of the acknowledgment ceases, and the *towliat* goes with all its adjuncts to the person designated by the *wâkif*.

"A *mutwalli* has no power to mortgage a *wakf* property, and if he does so he commits breach of trust and ought to be removed. The mortgagee should not take possession of the property

[1] Viz., *The Khairiyèh*.

mortgaged to him, and if he does so he will be liable for damages."[1]

"In the *Kinia* it is laid down that it is not lawful for the *mutwalli* to borrow for the purposes of the *wakf* even in case of necessity without leave of the Kâzi. If he is away from the Kâzi, he must borrow it on his own credit. So also in the *Khazânat-ul-Muftîin*."

"In the *Ashbâh-wan-Nazâir* it is stated that the Sâhib-i-Manah [*i.e.*, the author of the *Manah*] was asked regarding a *nâzir* (*i.e.*, *mutwalli*) who had borrowed money on the *wakf* property and spent it over the beneficiaries (*lit.*, those deriving sustenance from it), and he had been since dismissed, and the debts were still due, whether the second *mutwalli* was bound to pay such debts out of the *wâkf* property. The Sâhib-i-Manah answered that a *mutwalli* has no power to borrow money to spend on the beneficiaries; but he can for necessities, such as repairs and such like matters, borrow with the leave of the Kâzi. . . . And therefore the dismissed *mutwalli* will be liable (personally) for the debts contracted and not the *wakf* property."[2]

Similarly, in the *Radd-ul-Muhtâr;*—a *mutwalli* cannot contract debts for the *wakf* unless they are made in consequence or in pursuance of the directions given by the *wâkif*. The *mutwalli* cannot create any charge on the *wakf* estate or incur liabilities for which the *wakf* estate might be liable, unless such charge is created or debt is incurred under express powers given by the *wâkif*. This restriction does not apply to the powers of the executor, for it is lawful for him to contract debts for the necessaries of the minors confided to his charge, and the infant and his estate would be liable for such debts as are incurred *bonâ fide* by the executor for the infant. But the *wakf* cannot under any circumstance, in the absence of any provision in the *wakfnamah* to that effect, be made liable for any debt contracted by the *mutwalli* on his own responsibility. A debt contracted by the *mutwalli* is his personal debt. Should it become necessary to incur a debt for the *wakf* or to create a charge on the estate, the *mutwalli* can only do so with the sanction of the Kâzi previously obtained.[3] This principle does

Debts contracted by the *mutwalli*.

[1] *Surrat-ul-Fatâwa*, p. 436.

[2] *Ibid*, p. 440.

[3] *Radd-ul-Muhtâr*, Vol. III, p. 649. According to *Abû Lais;* See *seq.* On Alienations.

not refer to such debts which, owing to the exigencies of society, must necessarily be contracted from day to day for the due discharge of the works of the trust; for example, a debt to the oilman for the oil to light the mosque, to the baker to supply bread for the students of a madrassa; all these can only be paid at periodical intervals. Such necessary debts must be paid out of the income of the *wakf*.

If the *mutwalli* has advanced money to the *wakf* estate for the purpose of protecting the interests of the *wakf*, he can repay himself out of the profits of the *wakf* property coming into his hands. But when the *mutwalli* has any claim against the *wakf* estate for advances made by himself, he has to establish such claim by valid proof, otherwise it will not be maintainable. The *mutwalli* is, therefore, bound to keep clear and distinct accounts of his expenses with vouchers and other proofs; in which case a claim for any credit given by the *mutwalli* to the *wakf* would be maintainable, and such advances will be liquidated out of the rents and profits of the *wakf* property. But the *wakf* estate cannot be *charged* with any debt either to the *mutwalli* or anybody else, without the sanction of the Kâzi previously obtained.

It is lawful for a *mutwalli* with the income of a *wakf* to erect shops, houses, &c., which may yield profit to the *wakf*, as all this is for the benefit of the *wakf*. All properties purchased by the *mutwalli* out of the proceeds of the *wakf* become part of the *wakf* and are subject to the same legal incidents as the original *wakf* estate. And the *mutwalli* will not be entitled to dispose of them without the sanction of the Kâzi.

If the directions of the *wâkif*, or the rules for the administration of the trust cannot be ascertained, the *mutwalli* should ascertain the practice of his predecessors and act accordingly. The *mutwalli* is not entitled to undertake any expenditure utterly inconsistent with the original character of the *wakf*, for example, a *mutwalli* of a mosque is not entitled to purchase cloth from the funds of the mosque and distribute the same among the poor; and if he does so, he will be liable to pay the money from his own pocket.

If a *mutwalli* contract a debt for the purchase of necessary articles for the mosque, when there is no money of the mosque in hand, in other words, if he has purchased goods for the *wakf*

intending to pay for the same on realising the rents thereof, or if he has paid for the same from his own pocket, he is entitled to pay the debt when the rents come into his hands or recoup himself as the case may be.

The *mutwalli*, however, is not entitled under any circumstance to create any incumbrance by way of mortgage upon the *wakf* property. Nor can the beneficiaries hypothecate *wakf* property. Accordingly, if the *mutwalli* mortgages the *wakf* property and the mortgagee takes possession of the same, he will be liable for the customary rent thereof.

In the same way, if a *mutwalli* sells certain *wakf* lands, and subsequently the sale is set aside by the Kâzi, the purchaser, if he takes possession of the said lands, will be liable for mesne profits, calculated upon the customary rates.

If a person find a "trove" belonging to the *wakf*, the *mutwalli* may give something out of the same to the finder if he is poor.

As already stated, a *mutwalli* may, when suffering from death-illness, entrust the *towliat* to another person, that is, appoint a *mutwalli* in his stead, for the *mutwalli* is like an executor, and the executor is empowered to appoint an executor to the original testator.

If some portion of the building of the *wakf* is so dilapidated as to endanger the safety of others, and the neighbours insist upon the *mutwalli* repairing the same, and it happen that the *mutwalli* has no funds wherewith to repair the building, he can with the permission of the Kâzi, contract a debt for that purpose. Debts can be incurred by the *mutwalli* only when there are no *wakf* funds in his hands to meet the requirements of the *wakf*. The *mutwalli* is authorised to deduct from the *wakf* income any sums spent by him legitimately for the purposes of the *wakf* out of his own pocket.

If a person make a *wakf* of his lands for the poor, without specifically providing for the cost of repairs or cultivation, the income will nevertheless be first employed in paying the *khiraj* or tax, and then for the payment of the cost of collection, maintenance, repair, cultivation and such like matters, and the residue (after defraying the said costs) will be applied for the poor, *e.g.*, if the *wakf* consists of lands covered with date trees, the *mutwalli* should first pay out the expense of planting new date-trees and keeping up the old ones, for making walls and dams, so that the fruit-trees may not be

exhausted or killed. If any portion of the land dedicated is unculturable, the *mutwalli* should take from the income the expense of rendering it fertile. If barns for storing grain, or reservoir for storing water be necessary for the irrigation of the lands, the *mutwalli* is entitled to spend a portion of the income for that purpose. If the *wakf* land is contiguous to the city, and it is more profitable for the *wakf* that it should be let to tenants than be used for cultivation, the *mutwalli* may erect buildings for tenants or let the land to them without the buildings.

Mahommed says, that if the *wakf* lands become unculturable and cease to yield any income, and the *mutwalli* can, with its price, get another piece of land yielding more profit, it is proper that he should do so; that is, he should [with the requisite permission,] sell the land and with its price buy another piece. But if the land is far away from towns, so that buildings will not yield any profit, he may not erect buildings, Abû Jaafar has held that when the *wâkif* has made no provision regarding the mode in which the land should be used, the *mutwalli* is authorised to use the land to the best advantage for the *cestui qui trust*, but he cannot give a long lease without the sanction of the Kâzi.

Discretionary Trusts.

If a man make a *wakf* some property and declare that the *mutwalli* may give the income thereof to whomsoever he likes, or may apply the proceeds thereof according to his discretion, it is lawful,—and the *mutwalli* may give it to both rich and poor.[1]

"In the *Manah* it is stated from the Jurist Zain ibn Nujaim that where there is an old existing *wakf*, but its deed is lost and the *mutwalli* is unable to find out the mode in which the produce should be spent on the beneficiaries, he should ascertain the usage of his predecessors and how they made the application, and proceed in accordance therewith."[2]

Mode of disbursement when proof of custom wanting.

If there is no proof forthcoming as to who are entitled to the benefit of a *wakf*, or as to the mode of disbursement followed by the *mutwallis* of former times, the *wakf* should be applied for the benefit of the poor.

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[1] Though in the case of these discretionary trusts, the administration of the *wakf* is left to the discretion of the trustee, still, "the power is accompanied with a duty and meant to be exercised," and the Kâzi will compel the *mutwalli* to apply the income properly.

[2] *Surrat-ul-Futâwa*, p. 442.

In the *Aufaa-ul-Wasâil* it is stated from the *Zakhîra* that where there is an old existing *waâf*, but the person dedicating it is not known; and some person is in possession of it under the title of being *mutwalli* and he asserts that the *wakf* in question is for a particular purpose, and he produces witnesses in support of his assertion, and there is no proof to the contrary, that assertion will be accepted. But when the purpose is known or the conditions laid down by the *wâkif* are ascertainable, such testimony will not be admitted.[1]

"A *wakf*" says the *Radd-ul-Muhtâr* "may be established without any evidence of the *wâkif's* declaration. This is the doctrine laid down by Abû Yusuf; and the jurists of Balkh, such as Abû Jaafar and others, follow this view; Khassâf also has adopted it. In the *Khairiyèh* it is stated that where there is an old *wakf*, known by reputation to be *wâkif* and its *wâkf* is unknown, should a wrong-doer get possesssion of it, the *mutwalli* can establish his claim, according to the approved doctrine, by the testimony of two witnesses; and the *Jâmaa-ul-Fusâlain* has followed this view."[2]

Evidence of reputation may establish a *wakf*.

So also in the *Kâzi Khân* a *wakf* may, according to the jurists of Balkh, be validly established by evidence of reputation.[3] If the dedication is one within the knowledge of the general public, as a matter of notoriety, "like the *wakf* of Amribn al-Aâs," (the Amru of European history,) it can be established by the testimony of witnesses, or it may be established by the evidence of user for the purposes of the dedication.

It is not necessary that the endowment should be in writing, or that the property should be delivered over. A verbal declaration of the intention to create an endowment is sufficient if made in the presence of witnesses.[4] Although the witnesses to the fact depose vaguely, yet their evidence, if corroborated by circumstances, is legally sufficient.[5]

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[1] *Surrat-ul-Fatâwa*, p. 442. [2] *Radd ul-Muhtâr*, Vol. III, p. 645.

[3] Kâzi Khân.

[4] *Doe dem Jaun Beebee* v. *Abdollah Barber*, 1 Fult. Rep., 345; *Shurbo Narain Singh* v. *Ally Buksh Shah*, 2 Hay, 415. *Abul Hasan* v. *Haji Mahammad Masih Karbalai*, 5 Sel. Rep., 87.

See also *Dalrymple* v. *Khoondkar Azeezul Islam*, S. D. A., 1858, p. 586; *Shoojat Ali* v. *Zumeer-ooddeen*, 5 W. R., 158.

[5] *Surrat-ul-Fatâwa*, p. 424.

The *wakf* of a property which is wrongly described in the *wakf-namah is valid*, if it is clear what was intended to be conveyed in trust. If the description, however, is so uncertain and indefinite as to render it impossible to find out what was intended to be conveyed, the *wakf* will not take effect.

"The Sâhib-i-Manah was asked the following question with reference to the effect to be given to a *wakf*. A man makes a *wakf* in favour of the poor and indigent and executes a deed of *wakf* properly sealed and signed and attested. After his death a number of people testify to the effect that the ultimate purpose was destined [by the *wâkif*] for a specified purpose (and not for the poor). Will such testimony be accepted and acted upon? The Sahib-i-Manah answered—'If the deed of *wakf* purports to be prior in date to the condition alleged by the witnesses no effect should be given to such testimony. But if the *wâkif* had reserved to himself in the *wakfnamah* the power of altering and cutting down, then regard is to be paid to the credibility of the witnesses.'"[1]

A person makes a *wakf* for the habitation of his *wife* in the wakf building, and then dies. The widow afterwards re-marries. She loses her right of habitation, and even if the second husband divorces her, she does not recover the right.

When a house is dedicated for the habitation of certain individuals they cannot partition the dwelling among themselves. But when a dedication is made for the residence of the members of a certain family, only those who are *mahram* to each other may reside in it, unless the dwelling is divided into apartments or rooms with doors, where a female may live with her husband without being subjected to the intrusion of a *ghair-mahram* (male) living in the same house. For example, if a house is dedicated for the residence of a family consisting of two married sons and two married daughters, in order that the husbands of the married daughters may be able to live in the same house, there must be separate rooms set apart for the sons and daughters respectively.

Section III.

The Lease of Wakf Property.

Lease of *wakf* property.

The jurist Abû Jaafar[2] says that where the *wâkif* has made no provision in the *wakfnamah* about the grant of leases in respect of

[1] *Radd-ul-Muhtâr*, Vol. III, p 650.

[2] Kâzi Khan.

the *wakf* property, the *mutwalli* is authorised to grant a lease thereof, subject to the condition that he should not lease a house for a longer term than one year (unless it is customary, or would be to the advantage of the *wakf* to do so ;) for a long lease is apt to give rise to confusion in the enjoyment of rights. And he may not give a longer lease of land for cultivation on the average for more than three years, unless it is for the advantage of the *wakf*, and is done with the sanction of the Kâzi. When there is a provision in the *wakfnamah* relating to the grant of a lease of the land for a term of one year, and the *mutwalli* grants a longer lease, the Kâzi shall consider whether it is to the benefit of the *wakf*. If it be not, he can set it aside. The jurist Abû Bakr Mohammed ibn Fazl and Imam Abu'l Hossain Alias-Sugdi are agreed on this point. But the jurist Abû Lais makes no distinction between houses and lands, and declares that a *mutwalli* may validly grant a lease for three years of all kinds of property without the sanction of the Kâzi.

The Judge, however, can authorise the grant of a lease for any term which may, in his discretion, be advantageous to the *wakf*.[1]

Discretion of the Kazi.

The Kâzi, as the general superintendent of all charities, in his capacity of the representative of the Sultan, has the power of empowering the *mutwalli* to grant leases for a longer period than provided for by the *wâkif*. Some jurists have held that where no term is limited by the *wâkif*, it is discretionary with the *mutwalli* to grant a lease for any term which may prove advantageous to the *wakf*. Generally, a lease of a house should not exceed a year, and of land a period of three years ; but according to these, the application of the principle will depend on the proper discretion of the *mutwalli*, the requirements of the *wakf*, and the custom of the locality. The jurists of Balkh and Abû Lais, however, have held that even when there is no restriction in a *wâkfnamah*, the *mutwalli* should not lease lands for more than three years without the leave of the Kâzi,[2] and the *Fatwa* is according to this view.

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[1] The Kâzi is the curator and guardian of the interests of persons who are dead or absent or unborn, of the poor, the indigent, as well as the custodian of the property of a deceased person and of things which are picked up.

[2] *Radd-ul-Muhtâr*, Vol. III, p. 657.

"If an executor or guardian leases the property belonging to his ward without the proper customary rent, or if a *mutwalli* acts in that manner in respect of *wakf* property, in all such cases, according to the illustrious Imâm Abû Bakr Mohammed ibn Fazl, the lessee will be regarded as a *ghâsib* (embezzler ;) but Khassâf holds that he will not be treated as a wrong-doer, but will be liable for the proper customary rent. And the *Fatwa* is according to this latter view." So also in the *Surrat-ul-Fatâwa* ; "If a *mutwalli* leases a *wakf* property for below its real rent, the tenant will be liable to pay the proper rent (*ujr-i-misl*, customary rent), and on this is the *Fatwa*."[1]

A lease given by a *muwtalli* is not cancelled by his death.

The lessee of *wakf* properties can plant trees or make erections on the land leased to him, provided such act does not in any way injuriously affect the property, but he cannot dig a reservoir or tank ; even the *mutwalli's* permission would justify his doing only such acts as are beneficial to the trust property.[2]

The lessee can remove such erections as he has built with his own money, provided their removal does not damage the property. If it does, the lessee will not be entitled to remove such erections.

Regarding erections on *wakf* lands, the following rules are applicable :—

"If the *mutwalli* of the *wakf* erects the building, with the property of the *wakf* or the income of the trust-property, the building becomes the property of the *wakf*, whether the erection be for the *wakf* or for himself, or whether it was erected generally without any specific purpose. If the erection was made with his own money or materials, but if it is erected for the *wakf*, or *generally*, then also it belongs to the *wakf* property, unless the *wâkif* himself is the *mutwalli* and the erection is made without any expressed purpose, in which case it remains his property, as is stated in the *Zakhîra*. If the *mutwalli* erects the building with his own money *for his own especial purpose and keeps evidence of the fact that it is erected for such purpose out of his own funds*, it will remain his property, and this is what is stated in the *Kiyia* and *Mujtaba*."

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[1] *Surrat-ul-Fatâwa*, p 436.

[2] *Radd-ul Muhtâr*, Vol. III, p. 560.

When a person, other than the *mutwalli*, erects a building on *wakf* property, for the use of the *wakf* (though temporarily and with the object of taking it back), if the erection is made with the permission of the *mutwalli*, it becomes *wakf*. The same is also the case when the erection is made without the *mutwalli's* permission, but for the use of the *wakf*; but, where the building is erected for the private purposes of the person erecting it, or where it is made generally without any expressed object, it will be lawful for him to remove it, provided no loss accrues to the *wakf* property in the removal. In the *Fatâwa Kâzi Khân*, it is stated that if a person plant trees in a mosque they become the property of the mosque. If a *mutwalli* were to lease the *wakf* lands to his father or son,[1] it would not be valid unless the rent is higher than is usually current, as in the case of an executor, who cannot sell the property of a minor unless at a higher price.

If the *wâkif* has made a condition that no lease shall be granted for more than one year, and it appears that a longer lease is good for the trust estate, in that case, as already stated, the *mutwalli* should apply for leave to the Kâzi to grant a longer lease and should act according to the Kâzi's directions.

"In the Chapter on *Wakf* in the *Manah* it is stated, that where a man has dedicated a house in favour of his children in perpetuity so long as his posterity lasts, and one of his sons gives a long lease of it to another, and that person under colour of that lease erects buildings in the house, if the person giving the lease is not the *mutwalli*, then the lease is void, and the lessee would be entitled to recover from him any money spent on the premises. If the person granting the lease is the *mutwalli*, then the lessee would be liable to pay the *proper* rent for such period as the Kâzi may fix." "If there are no funds to give the compensation, the land may be given in lease."[2]

If a *wâkif* has made a condition that the *mutwalli* shall not grant a long lease of the *wakf*, and people are not willing to take a short lease thereof, and it is to the advantage of the *wakf* that a long lease should be given, the *mutwalli* should prefer the

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[1] The principle would include any relation or connection.

[2] *Surrat-ul-Fatâwa*, p. 439.

matter before the Kâzi, who, if he deems necessary, can make an order to that effect, "for the Kâzi is the guardian of the poor." If the *wâkif* has made a condition that the *mutwalli* shall not grant a long lease unless he deems that it would be productive of great benefit to the *cestui qui trust*, the *mutwalli* can give the lease in case of necessity, without reference to the Kâzi.[1]

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[1] *Hedâya*, Vol. II, p. 888; *Fath-ul-Kadîr*, Vol II, p. 6, *Ramz-ul-Hakâik*; *Fatâwa Alamgirs*, Vol. II, p 641.

CHAPTER XIII.

ALIENATION OF WAKF PROPERTY.

When once a property has been dedicated or declared to be *wakf*, the right of the person dedicating "drops" absolutely. Thenceforth the property is "tied-up" in the ownership of the Almighty, and nobody has a right to deal with it in any shape—neither the *wâkif*, nor his heirs, nor the beneficiaries under the *wakf*.[1]

Accordingly, when once a property has been constituted *wakf*, all right of proprietorship ceases, and it cannot be alienated or transferred by sale or gift, nor is it subject to the rights of inheritance.[2] A *wakf* made *inter vivos*, that is, which is not dependent for its operation upon the death of the testator, cannot be revoked, nor is it affected by the subsequent misconduct or misdealing of either the *wâkif* himself, or those responsible for carying out his behests, so as to render it alienable, or to destroy the character of inalienability impressed by the constitution of *wakf*.[3]

As a general rule, therefore, private alienation, temporary or absolute, by mortgage or otherwise of *wakf* lands, even though for the repair or other benefit of the endowment, is illegal according to Mahommedan Law.[4]

In certain cases of *debutters* made by Hindus it has been held that a mere nominal endowment will not prevent alienation, and

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[1] *Fatâwa Alamgiri*, Vol. II, p 454, *Radd-ul-Muhtâr*, Vol. III, p 656; *Hedâya*, Vol. II, p 888; *Fath-ul-Kadîr*, Vol. II. p. 454.

[2] *Hedâya*, Vol. II, p. 888; *Alamgiri*, Vol. II, p. 454, *Fath-ul-Kadîr*, &c., &c.,

[3] *Ibid.*

[4] *Moulvee Abdoolla* v *M S. Rajesri Dossea*, 7 Sel Rep. 268; S D A. 1846, p 266 and see *M. S Qadira* v. *Shah Kubeer-oo-deen Ahmud*, 3 Sel Rep, 407; *Abul Hasan* v. *Haji Mohammad Masih Karbalai*, 5 Sel. Rep, 87; *Kulb Ali Hoosein* v. *Syf Ali*, 2 Sel. Rep., 139; *Moulvee Abdoolla* v. *Ramzoo Dye*, S. D. A, 1847, p. 192; *Jewun Doss Sahoo* v. *Shah Kubeer-ood-deen*, 2 Moo I. A, 390. S. C., 6 W. R, 3; *Syud Asheerudden* alias *Kalla Mrah* v *Sreemutty Drobo Moyee*, 25 W R., 557, *Doyal Chand Mullick* v *Syud Karamat Ali*, 16 W. R p 116,

the same principle, has been attempted to be applied to *wakfs* created by Mahommedans. These attempts have, no doubt, been founded on an erroneous comprehension of the Mahommedan Law. As pointed out already, the word "nominal" like the word "pretended" conveys the idea, that though an endowment is purported to be created, in reality the donor never parts with the property. Under the Mussulman Law, when an endowment is made in terms with a full knowledge of the meaning and effect of the word *wakf*, there can be no reservation, or *arriere pensee*. The law detaches the proprietary right of the donor from the subject of dedication ; and, therefore, once the *wakf* is made in express terms it cannot be said to be a *nominal* dedication under the Mussulman Law.

Grants to an individual in his own right for the purpose of supplying means of subsistence have been held not to be *wakf*. It must, however, be remarked that the nature of the grant would be modified by the circumstances of the special case. Where the grant is not absolutely to the grantee, and it appears that it is meant to provide means of subsistence to his descendants, the Mahommedan Law will regard it as a valid *wakf*. Again, where the grant is made to a person under the name of *wakf* and no mention is made of any further trust, it will nevertheless be effectual in creating a trust for the poor after the decease of the grantee ; and his heirs will have no right of property over the subject of the grant.

In one case it was held by the Calcutta High Court that when a heritable estate was burdened with a trust, *viz.*, the keeping up of a saint's tomb, it may be alienated subject to the trust.[2] But the correctness of the decision is open to serious question. In fact, the case was not argued before the learned Judges who laid down this far-reaching dictum. The first question in such a case was to consider whether the estate was heritable. If there was an actual dedication as *wakf*, it is submitted it would not be heritable. If there was no express constitution of the estate as *wakf*, but a trust had been created expressly for the purpose of maintaining the saint's tomb, the legal effect was absolutely the same. But if the property had been treated all along as heritable, in that case *only* the principle

[1] *Juddo Nundan Burral* v. *Kalee Coomar Ghose*, S. D. A., 1852, p. 331 *Gunga Narain Sircar* v. *Brindabun Chunder Kur Chowdhry*, 3 W. R., p. 142.

[2] *Bibee Kuneez Fatima* v. *Bibee Saheba Jan*, 8. W. R., p. 313.

laid down, in the case referred to, could apply, and the property could be alienated subject to the trust.

Futtoo Bibi v. Bhurrut Lall Bhukut

The decision in *Futtoo Bibi* v. *Bhurrut Lall Bhukut*[1] is extremely meagre and seems to be in conflict with the Mussalman Law. Neither the facts of the case nor the nature of the document appears in the report; and it is difficult to imagine the principle upon which the learned Judges proceeded. The English doctrine against perpetuity is not recognised by the Mahomedan Law; and, accordingly, where a property is burdened with a trust which is ostensibly lasting in its character, such property is considered to be tied up for that purpose, and consequently inalienable and non-heritable. In this connection, the remarks of their Lordships of the Privy Council in *Bishen Chand Basawut* v. *Syed Nadir Hossein*[2] are important. In the case of *Dalrymple* v. *Khoondkar Azeezal Islam*,[3] the Sudder Court held that if an endowment be wholly *wakf*, a *mutwalli* is incapable of granting a lease extending beyond the period of his own life; if, however, the office is hereditary, and the *mutwalli* has a beneficial interest in the endowment, they would look upon the property as an heritable estate burdened with certain trusts, the proprietary right of which is vested in the *mutwalli* and his heirs, and he can exercise the right possessed by other proprietors, of granting leases even in perpetuity. In this case the document of *wakf* was not before the Court, but apparently the office of *mutwalli* was hereditary, and the members of the family had a beneficial interest in the usufruct. At least the learned Judges assumed it to be so and chose to call the "endowment" a heritable estate burdened with certain trusts. By these expressions they did not mean to exclude the "endowment" from the general category of *wakfs*; they simply expressed, perhaps in somewhat inaccurate terms, the reasons which induced them to hold the lease valid. Whether such an estate is called "a heritable estate burdened with certain trusts," or a "*wakf*, the usufruct of which is descendable among the *wâkif's* heirs," the result is the same.

Where the property is dedicated in the first instance for *strictly* religious purposes, the mere charge of certain items which must in

[1] *Futtoo Bibi* v. *Bhurrut Lall Bhukut*, 10. W. R., 299

[2] I. L. R., 15 I. A., p. 1.

[3] S. D. A. 1858, p. 586

time cease, does not render the dedication invalid.[1] Nor does the mere stoppage of religious services start limitation against a *wakf*.[2]

Lands belonging to a Mahommedan, which are occupied by tombs, cannot be sold in execution of a decree.[3] Nor can a *makbara* or burial-ground be alienated, for it is *wakf* from its nature.[4] A general dedication of land for the purpose of a cemetery establishes *wakf*, and excepts the same from descent to the heirs.[5] It has been held, however, that the mere existence of tombs on a piece of land, unless it is constituted into a *makbara*, does not prohibit partition, except as to the actual spot covered by the tombs.[6]

Where certain *inaam* land, granted for the service of a *masjid*, was attached in satisfaction of a decree obtained by a mortgagee of the property against the descendants of the original grantee, who had mortgaged it to him, it was held that by the Mahommedan Law the mortgage was illegal and void, as land appropriated to religious purposes could not be sold or mortgaged by any of the descendants of the original proprietor; and the Court agreed that the attachment should be raised.

The mutwalli has no power of mortgaging the wakf property without the sanction of the Judge.

The *mutwalli* may, however, under special circumstances, pledge the *wakf* property, either wholly or partially, *with the sanction of the Kâzi*, as previously stated, and may even alienate a portion of the property. But any such act done without the premission of the Kâzi is wholly void and inoperative.

Moulvee Abdoollah v. Rajesri Dossea and another.

In the case of *Moulvee Abdoollah* v. *Rajesri Dossea and another*,[7] the plaintiff (who was the appellant in the Sudder Court) sued as the *mutwâlli* of a mosque for the rents of certain lands attached thereto. The defendant Rajesri Dossea pleaded that one Mahomed Ufzul, the late superintendent, borrowed from her husband 51 rupees for the repairs of the mosque, and mortgaged to him the rents of the 8 cottahs and tank for three years, providing in the deed of mortgage, dated 9th Jeyt 1219, that the debt was to bear interest at 1 per cent. per mensem for those three years, and that

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[1] *Muzhoor-ul-Huq* v *Puhraj Dutarey Mohaputtar*, 13 W R, 235.

[2] *Doyal Chand Mullick* v. *Syud Karamat Ali*, 16 W. R., 116.

[3] S D A Beng Sum. Cases, p 40, 21st Novr, 1812.

[4] 5th December 1846, S D A N W. P., p 250.

[5] 5 S D A. Rep. (Beng) p. 136, 30th July, 1831.

[6] Sel Rep 204, Bom S A., 1839.

[7] 7 Select Reports, p 268.

at the expiration of three years, if the debt was not paid off, the rent of the 8 cottahs, 5 sicca rupees per annum, should be sold to him for the debt, and the rent for the tank, or 1 rupee per annum, paid to the superintendent for the expenses of the mosque. She contended that as the debt had been incurred by Mohammed Ufzul for the repairs of the mosque, and the mortgage had not been cleared off, the engagement was binding on his successor, the present plaintiff. The first Court decreed the plaintiff's suit, but it was dismissed by the Lower Appellate Court on the ground that the mortgage was created for the benefit of the mosque by the late incumbent and was therefore valid. On appeal by the plaintiff, the Sudder Court held, in accordance with the *Fatwa* of the Law Officers, that the alienation by mortgage of land devoted to religious purposes, and of the produce of such land, was invalid, and that the fact of the land being mortgaged for the repair or other benefit of the mosque, did not affect the case.

Necessity no ground for alienation.

When the sale of *wakf* property is set aside on the ground that it was not alienable, and "it has happened" that in the interval erections have been made by the purchaser, he would be entitled to remove those erections provided they can be separated from the *wakf* property without injury to it. If they cannot be so removed, as in the case of trees planted by the purchaser, the Kâzi may, in his discretion, direct a legitimate compensation, provided the erections distinctly add to the value of the *wakf* property. If the erections have been made by pulling down the original *wakf* building, or the trees are planted from grafts taken from the *wakf* property, the purchaser is not entitled to receive any compensation for them. He is only entitled to recover back from *his vendor* the value paid by him.

No alteration made in a *wakf* building by the purchaser or anybody else would change the character of the *wakf*. The purchaser would be liable for any loss occasioned to the *waḳf* by his alteration or addition to the *wakf* building, and for restoring it to its original condition, but he will not be entitled to any compensation on account of any improvement, unless those improvements are distinctly separable.

The purchaser will not be entitled to remove any erection made by him, if from such erections an advantage accrues to the *wakf*. For example, a man makes a better oven for preparing bread in

place of an old one, he cannot remove it, nor is he entitled to any compensation for it. But if he fixes lamps he can remove them, or if they are left, he is entitled to compensation.

The purchaser is entitled to recover the value of the building at the time when the sale is set aside and not the price paid by him. For example, if a man purchases a house for ten thousand dirhems and lives in it, and the house has become dilapidated he is not entitled, when the sale is set aside, to the price which he paid for it. If the value has increased, the purchaser would be entitled to receive the enhanced price.

A *wakf* created with a knowledge of its effect absolutely binding.

When a person makes a dedication by a deed, and afterwards says he does not know what is contained therein, or that he did not intend to create an irrevocable *wakf*, in such case, if it appears from the evidence of witnesses or otherwise, that the document was either read by or explained to the person, and that he fully understood its purport, his denial will be of no avail. And this principle does not apply to *wakf* alone but to all transactions.[1]

A person intending to make a *wakf* of his lands in a particular village gives instruction at the time of his death for the preparation of a document therefor. The writer, however, by mistake leaves out certain plots of lands. If, at the time of reading the document, the plots left out by mistake are not called to his attention, but he says that he dedicates all that is contained in that village, the *wakf* according to the jurist Abû Lais, will take effect with reference to all the lands. The same principle applies to a dedication made in health. The essential point to consider is whether he intended to adhere or not to his expressed intention of dedicating *all* his lands.[2]

In the *Khazânat-ul-Muftîn* it is stated that when a person has made a *wakf* in favour of certain specific individuals, without designating any ultimate trust of a permanent character, and has not had the document (*sikk*) of *wakf* sealed by the Kâzi, he may, if he falls into poverty, apply to the Kâzi to allow him to revoke the *wakf* so as to relieve him of his poverty. The impressment of the seal of

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[1] وهذا لا يختص بالوقف بل البيع وسايرالتصرفات يكون كذلك

Kâzi Khân.

[2] *Ibid.*

the Kâzi is equivalent to the registration of a document in British India.

When a *wakf* is made of land, everything appertaining to the land, such as tenements, roads, ghauts, trees, &c., attached to, or on the land, passes under it, but not partible produce. When land is dedicated for a cemetery, whilst big trees and buildings are on it, they will not be included in the *wakf*, although it may have been stated in the *wakfnamah* that the dedication is "with all appurtenances and rights."

If there are fruit-bearing trees on the land or a *hammam* attached to the premises dedicated, and the dedication is made with the expression "with all appurtenances and rights belonging thereto," they will be included in the *wakf*.

A *wakf* for digging graves for the poor and providing shrouds is valid.

An opinion has been expressed by Imâm Ali al-Sugdi that a *wakf* in favour of Sufis is not valid. But this view is contradicted by other jurists. And the Shams-ul-Aimma has stated that a *wakf* is valid for all who are needy and indigent, and that when a *wakf* is made for a large body of people, it should be taken as referring to the poor and indigent among them; and if the *wakf* is general in its terms so as to include both rich and poor alike, the persons or the class of persons for whom the benefit is intended should be distinctly indicated, or it must appear from the words of the *wâkif* that though the terms are general, the intention is that indigence should furnish the claim to share in the benefit. For example, if the *wakf* is for orphans generally, it is valid, and its benefit shall be applied to the poor among them. Hence, a *wakf* is valid for the lame and paralytic and the blind, the readers of the Koran, lawyers, traditionists, &c., and it will be expended on the poor among them, for indigence is clearly inferrible from those words. For the blind, the lame, those who devote themselves to study and such like, cannot apply themselves to obtain a livelihood. Hence, indigence or want is their normal condition. And, accordingly, a *wakf* in favour of Sufis also is valid, for they are generally very poor and lead a life of austerity.[1]

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[1] *Radd-ul-Muhtâr*, Vol. III, p. 665

CHAPTER XIV.

THE SHIAH LAW RELATING TO WAKF.

SECTION I.

GENERAL OBSERVATIONS.

How *wakf* may be constituted under the Shiah Law.

Wakf, according to the Shiah doctrines, is a religious act the effect of which is to tie up the *corpus* or substance of a thing, and to leave its usufruct free. According to the *Jawâhir-ul-Kalâm*, the object of a *wakf* is the continuance in perpetuity of a benefaction in the service of the Deity, and it is an act of *ibâdut* (worship). The express word by which it may be created is *wakafto*, *i.e.*,—"I have dedicated;" but as already pointed out before, in relation to the Hanafî Law, a *wakf* may be created by any other expression when the intention is apparent. The *Jawâhir-ul-Kalâm* states that there is nothing in law to debar the creation of a *wakf* by the use of any other expression besides *wakafto*. For example, a *wakf* may be created by the expression *haramto*, ("I have consecrated," or *tussudukto*, "I have given in charity"). But as absolute perpetuity is not a necessary incident of these expressions, reference must be made to the intention of the donor. The meaning of this is, when the intention of the grantor is clearly to create a *wakf*, whatever expression he may have used, the dedication will take effect, but where the term *wakf* itself is used, the dedication will take effect as such without any question. If a person make use of an expression which does not, in any degree, convey the idea of *wakf* and yet acknowledge that he intends to make a *wakf* thereby, it will take effect as a *wakf*. If a man were to say, "I have consecrated this house for the poor and given it in perpetuity," it would be a *wakf*. If he were to say, "I have tied up this property and given it in the way of God," or "that I have tied up this property and given the profits in the way of God," it would be a *wakf*.

Where a trust is expressly created, the introduction of words of gift does not change the character of the *wakf*. This question was considered at some length in the case of *Phudia Bibi and others* v. *Haji Mohammed Kazem Isphahani and others*, decided by Pigot, J., on the 31st of March 1884, upon the construction of the will of Nawab Sidi Nazir Ally Khan. By his will the Nawab had devised all his property to an executor, whose heirs the plaintiffs claimed to be, on certain trusts which were purely discretionary. The plaintiffs contended that the devise was an absolute gift to the executor, Meer Mohammed Kazem. The defendants contended that though the term *wakf* was not used in the document, which was in the English language and form, it was a valid *wakf*. The will was as follows:

Phudia Bibi and others v. *Mohammed Kazem Isphahani and others* (unreported).

"This is the Last Will and Testament of me Nawab Sidi Nazir Ally Khan of Ballygunge in the suburbs of the town of Calcutta, zemindar, whereas I am indebted to various persons in large sums of money such loans being secured to them by mortgages over my real Estate in Calcutta and in the Mofussil and my Promissory Notes and whereas being about to leave India I am desirous of making a Testamentary disposition of my property in the event of my decease, I give devise and bequeath all my real and personal Estate whatsoever and wheresoever of which I shall be seised and possessed at the time of my death unto Meer Mohammed Kazem Jowahery of Chitpore Road in Calcutta upon Trust at his discretion and at his absolute authority and as and when he or any other of the Trustee or Trustees for the time being of this my will shall think fit to sell and dispose of collect and get in and convert in money all and singular my said real and personal Estate or any or such portion thereof as he the said M. M. Kazem or any other Trustee or Trustees for the time being of this my will shall in his or their discretion think fit or advisable and upon further Trust by with and out of the monies to arise from such sales and collection to pay satisfy and discharge all my just debts and funeral and Testamentary expenses and upon further Trust to lay out and expend such portion of the surplus of the said monies as the said Trustee for the time being of this my will shall think fit in the construction or building of a mosque Imambara or Mahommedan religious institution to be called by my name for the performance and observance of religious ceremonies and festivals and acts of piety and charity inculcated in and enjoined by the Mahommedan religion the nature character and extent of which shall be in the entire and absolute discretion of the Trustee of this my Will for the time being and upon further Trust to lay out and invest the Residue of the said monies after payment of the cost of the construction of the said Mosque Imambara or other Mahommedan religious Institution as aforesaid in or upon Securities of the Government of India or in

or upon the purchase of real property in Bengal and I direct that the said Trustee or other the Trustee or Trustees for the time being of this my Will shall hold the interest rents and profits of the said Securities or real property in which the said monies may from time to time be invested upon trust to apply the same in and towards the repairs maintenance and preservation of such parts of the said real state as shall not have been sold as well as of the real estate in which the said Trust monies may be invested and the payment of all Rents Revenues Taxes and other outgoings and expenses incidental thereto and upon Trust to apply the surplus or balance of such interest rents and profits and also the rents and income arising from such parts of my said estate as may not be sold as follows that is to say as to such portion thereof as the said Trustee or other the Trustees for the time being of this my Will shall in his or their judgment and discretion think fit in and towards the performance and observance of religious ceremonies and festivals and acts of piety and charity inculcated in and enjoined by the Mahommedan religion the nature character and extent of which shall be entirely in the judgement and discretion of my said Trustee or other the Trustee or Trustees for the time being of this my Will and as to the balance or residue thereof to and for the absolute use and benefit of the said Trustee or other the Trustee or Trustees for the time being of this my Will and I give and bequeath the same unto him or them his or their executors administrators or assigns accordingly.

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Provided Also and I further declare that it shall be lawful for the said Trustee or Trustees for the time being of this my Will at any time or from time to time in the discretion of the said Trustee or Trustees to sell or dispose of any stocks—funds—securities or lands wherein any of the Trust monies for the time being shall or may happen to be invested and to invest the money to arise from such sale in any other stocks or funds or other Government securities or in purchase of real estates in Bengal and way or transfer the same as occasion shall require or shall be thought fit. Provided also and I hereby declare that in case the said Meer Mohammed Kazem shall die in my lifetime or shall renounce the execution of the Trusts hereby created or in case the said Meer Mohammed Kazem or any Trustee or Trustees to be appointed under this present provision shall die or shall be absent from Bengal for the space of six consecutive calendar months at one time or shall otherwise become unwilling or unable to act in the aforesaid Trusts then and so often as the same shall happen it shall be lawful for the said Meer Mohammed Kazem or other the Trustee for the time being or if there be no Trustee then for the Executors or administrators of the last deceased Trustee to nominate any fit person or persons to supply the place of the Trustee so dying residing abroad or becoming unwilling or unable to act as aforesaid and that immediately after every such appointment the said trust estates monies and effects stocks funds or securities shall be conveyed or transferred in such manner

that the same may vest in such new Trustee and such new Trustee shall have and be capable of exercising all the powers and authorities whatever hereinbefore containing in the same manner to all intents and purposes as if he or they had been appointed a Trustee or Trustees by this my Will.

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The learned Judge with reference to the principal contention, held as follows :—

"Now, it is contended that by this document Nazir Ally gave his estate to Meer Mohammed Kazem subject to trusts merely colorable and not intended to be carried out. The question is, whether this contention is a valid one. The principal case relied on by Mr. Phillips was *Morice* v. *The Bishop of Durham*.[1] Now, in this case it appears to me the question is not whether a good trust was created, but the plaintiff's case will not succeed, unless it is shown by her that Meer Mohammed Kazem was not intended to take as a trustee. If he was intended to take as a trustee, he would not take any beneficial interest. The deed declares that Meer Mohammed Kazem takes as a trustee. It lies upon the plaintiff to show that he was to take absolutely. There can be no doubt that there was a trust regarding some portion, in the building of the mosque, &c. So far therefore he took as a trustee. But as regards the unconsumed income, it has been contended that Meer Mohammed Kazem took absolutely. The will, however, says that he was to take it as a trustee. If it had said that the office of *mutwalli* was hereditary, a step might be gained in favour of the plaintiff's contention. But it is not so here. It cannot be said that the beneficial interest was given to the heirs of Meer Mohammed Kazem, when each trustee has the power of appointing another person as trustee. Then I am to regard the various clauses in the Will regarding the appointment and reponsibilities of the trustees. I might, perhaps, if I were not deciding the question judicially, have said that Nazir Ally probably intended that the property should, or expected that it would, descend to his friend's descendants, each of them successively, exercising his power of appointment in favour of his heir, or some of his heirs. But I cannot import this conjecture into my judgment for the

[1] 10 Ves., p. 510.

purpose of construing the plain terms of the Will. Then it was argued that the mere beneficial enjoyment of the unexpended income indicates a strong intention to create a beneficial interest and did in fact create such an interest. Without examining the cases in detail, it is sufficient to say that the cases cited by Mr. Kennedy and Mr. Ameer Ali, notably those of *Doe dem Jaun Beebee* v. *Abdollah Barber* and *Advocate-General* v. *Fatima Bibi* show that no surmise can be founded upon the fact that the residue or balance of the income was to be enjoyed by the Trustee. That being so, I think the contention of the plaintiff must fail, and the issue raised whether the estate of Nazir Ally formed part of the estate of Meer Mohammed Kazem must be determined in the negative."

The *Sharâya* defines a *wakf* in the following terms :—

Definition of *wakf* according to the *Sharâya-ul-Islâm.*

" *Wakf* is a contract, the fruit or effect of which is to tie up the original of a thing, and to leave its usufruct free. The only express word by which it can be constituted is '*wakafato*,' 'I have appropriated ;' for with regard to '*harramto*,' 'I have consecrated,' and '*saddakto*,' 'I have given in charity' they are not sufficient to constitute *wakf* without accompanying circumstances, as by themselves they are susceptible of another interpretation besides *wakf*. If, however, they are used with the design of constituting *wakf*, they are obligatory on the conscience of the person employing them without any circumstances to fix their meaning. And if he should actually acknowledge that he used them with that design, judgment should be given against him in terms of his acknowledgment. It has been said, indeed, that if he should say, '*Hubbusto o Subbulto*,' *wakf* would be constituted even without any circumstances to point this meaning, because, he, on whom be peace, [*viz.* the Prophet] has said," *Habbis ul asl wa subbil ul sumrat*' (tie up the substance and give away the fruit). Others, however, have maintained that there would be no *wakf* in these cases without corroborative circumstances, as the words by themselves would not commonly be so understood ; and this is the more approved opinion."

The opinion expressed in the *Sharâya* is explained in the *Jawâhir* by the light of the dictum contained in the *Ghunia* and other works of authority. In other words, when a disposition is made by terms which are equivocal in their meaning, reference is

to be made to the intention of the donor. If he is alive, he will explain his meaning; if he is dead, his intention is to be gathered from the nature of the object in favour of which the grant is made or other attendant circumstances. For example, under the Shiah Law, a *hubs* or a limited estate is lawful; therefore if a grant is made in favour of an *individual* by that term, it may either mean a life grant or *wakf*. Therefore, reference must be made to the intention of the grantor. If he said '*hubs*' in favour of *A*, and then for the poor, it will be a *wakf*, or if it was a *hubs* in favour of a mosque or any object of public utility (*maslahat*), it will be a *wakf*. A *wakf* may be created for a mosque or any other object of utility (*maslahat*) by any expression; for the nature of the object being permanent and religious, carries with it the meaning of consecration.

Possession necessary, subject to qualifications.

"And the delivery of possession is a necessary condition for the validity of the *wakf*." But this principle also should be taken subject to the conditions pointed out in dealing with the Hanafi Law, that is, actual change of possession is not necessary, constructive transfer being sufficient. For example, it is lawful for the *wâkif* to constitute himself *mutwalli*. In such a case, a formal change of possession is out of the question. And, therefore, what is intended by the principle is not actual delivery of possession to another, but change in the character of the possession or of the dominion exercised over it. It is in this sense that the *Mafâtîh* declares that if the *wâkif* continue to exercise his right over it and make no change in the character of the possession, the *wakf* will not take effect. Where a dedication is for a public purpose, no (express) delivery of possession is necessary, for the user of it by any individual is sufficient to constitute a valid *wakf*.[1]

According to the *Jawâhir* delivery of possession is not necessary also where the *wakf* is in fact a *sadakah*, a charitable grant. Similarly, in the case of a masjid or any *maslahat* or object of utility. In these cases the mere non-delivery of possession will not avoid the *wakf*. When the *wakf* is in favour of private individuals who are *sui juris*, a trustee should either be appointed and possession delivered to him to hold in trust for the beneficiaries, or

[1] *Jawâhir ul-Kalâm*, Chapter on *Wakf*.

if the *wâkif* continues to hold the *wakf*, his possession must be expressly that of a trustee.

When a *wakf* is created for the *wâkif*'s minor children, transmutation of possession is not needed. The law presumes the father's possession to be that of a *mutwalli* on behalf of the minors.[1] Similarly in the case of a *wakf* for the poor.[2]

When all the conditions requisite for the completion of a *wakf* are complied with, it becomes absolute (if made in health) and cannot be revoked according to "our" doctrines. "On this point," says the author of the *Jawâhir-ul-Kalâm*, "Abû Hanîfa differs from us, though his disciple Abû Yusuf on arriving at Bagdad dissented therefrom. If the subject of the *wakf* has once changed possession and ceased to be under his dominion, or has come into the hands or under the control of the beneficiaries or the trustee on their behalf, the *wâkif* cannot revoke it or change the conditions of the *wakf* or withdraw it from the way of God or from the purposes to which it is dedicated."

"If the *wakf* is for minor children, the *wakf* is irrevocable though no change of possession has taken place."

Wakf made in death-illness.

All this relates to a *wakf* made in health. But if a *wakf* be constituted at a time when the *wâkif* is suffering from a *death-illness*, it will take effect with reference to the entirety of the dedication, provided the heirs consent, either before or after the death of the *wâkif*, otherwise the *wakf* will operate only in respect of one-third of the estate of the testator. "For a *wakf* is like other acts which take effect immediately such as *hiba*, sale and similar obligations."[3] If the *wakf* property is covered by one-third of the estate, then it is valid as regards the entirety of the dedication. If not each provision will be given effect to with regard to its priority until one-third of the estate is exhausted.

"If a person," says the *Sharâya*, "should, in death-illness, make a *wakf*, gift and *muhabat* sale and emancipate a slave, and the acts be not allowed by his heirs, then they would be valid if they can be carried into effect out of a third of his estate; otherwise they are to be preferred according to priority of date, and effect

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[1] *Jawâhir-ul-Kalâm*, Chapter on *Wakf*. [2] *Ibid*. [3] *Ibid*, *Ghunia*.

is to be given to each in order until the third of the estate is exhausted, after which any that may remain is void."[1]

There is this difference between immediate dispositions of property, *i.e.*, dispositions *inter vivos* and bequests, that in the former case the one-third takes effect in respect of the existing property, whereas in the case of bequests, consideration has to be paid to the condition of the estate after the decease of the testator. If there happen to be many bequests in a *wakf*, and it is difficult to determine which provision should take priority, *i.e.*, when all the provisions are of the same degree of importance, in that case, according to the Shaikh[2] all the provisions should be given effect to, and the one-third respecting which the *wakf* is operative should be applied to the effectuation of all the objects. "When a person," says the *Sharâya*, "has bequeathed property for the performance of certain duties, some of which were incumbent on the testator and others only optional, they are all to be carried into effect if a third of his estate be sufficient for the purpose. If the third should not suffice and the heirs refuse their consent, those duties that were incumbent on the testator must first be discharged out of the general mass of his estate, and then the others out of a third of what remains beginning with the first mentioned by the testator, and so on in order. If none of the duties are of the incumbent description, but all optional, they take effect only to the extent of a third of the estate and are to be discharged beginning with the first mentioned by the testator, and so on in order until the third is exhausted."

Section II.

Conditions Relating to the Subject of Wakf.

The subject of *wakf*.

"By *Ijmâa* it is requisite that (1) the subject of the *wakf* should be *maalûm* (specific or ascertained), (2) of such nature that it can continue for ever, and (3) can be transferred from one *mutuallî* to another." This is expressly enunciated in the *Jawâhir-ul-Kalâm*. It is also requisite that it be the property of the appropriator.

[1] *Sharaya-ul-Islam*, p 234

[2] *Mafâtîh* after the *Wabsût*, Shaikh Murtaza is meant here. See Introd., p 31.

According to the ancients the *wakf* of a debt payable to a person was not valid,[1] because it was a thing, in their opinion, not existing in specie.

They also held that where a thing could not yield a profit without being consumed in the process, the *wakf* thereof was invalid. Profit *quâ* profit was, upon the same reasoning, considered incapable of being consecrated. But, as will be seen later, the reasons upon which the ancient opinions were founded, have been considerably modified owing to altered circumstances and the development of industry and commerce. The observant reader will not fail to observe the close analogy existing between the Hanafî and the Shiah Law on the subject under discussion. The early Hanafî lawyers regarded the *wakf* of movables including "*dirhems* and *dinars*" as invalid, because there was no permanency in them, and because they would be consumed in their use. The Shiah lawyers, however, were in advance of the Hanafî jurists in one respect. They held that the *wakf* of anything from the use of which benefit could be lawfully derived, consistently with the preservation of the thing itself, was valid; thus the *wakf* of a trained dog or cat was held to be valid, "from the possibility of benefit being derived from them."[2] They also held on the same principle[3] the *wakf* of *akâr* or land and houses, of clothes, furniture and lawful instruments to be valid. The *Jawâhir* goes further and adds "though the *wakf* of food and such like things is not valid, because they are consumed in their use, the *wakf* of violets, or flowers in general, and lamps (*kandîl*), mats, &c., are valid according to custom and times." As regards the legality of the *wakf* of profits they argued thus: "The *wakf* of a *dayn* or of a thing indeterminate is not valid by reason of there being no certainty or identity of the same."[4] And, consequently, as a debt was a thing not existing in specie, it could not be dedicated. Similarly with reference to the *wakf* of money, they supposed that the element of permanency was wanting. The *Jawâhir-ul-Kalâm* has

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[1] *Sharâya-ul-Islâm*, p. 248. This must, however, be taken subject to qualifications discussed afterwards, see *seq.*

[2] *Ibid.* This shows how elastic the rule is, and that one must not go by the letter of the law but by its spirit.

[3] *Ibid.* [4] *Mafâtîh.*

discussed the subject at some length. "And whether the *wakf* of *dinars* and *dirhems* is valid or not, the opinion of some is that it is not, and this seems to be in accord with the ancients (*mutakad-damîn*). And in the *Mabsût* it is said that there is general agreement about it, with the exception of those who held it valid, who are few. The reason is that *dinars* and *dirhems* are expended and no further use can be derived from them, and this is against the principle that a *wakf* must always be subsisting and its profit should be applied for the relief of the poor and other good acts, but when the profit of a thing is always subsisting, as in the case of a honey-comb, it is valid." A close examination of the authorities leads to the result that the *wakf* of profits and of monies, when they can be permanently applied in trade or commerce, so that a permanent benefit may be derived from the same, is valid, as will be seen from the remarks which have already been made in respect of the Hanafî Law. This view is in accord with the altered conditions of society. The principle, upon which the more ancient lawyers of the Shiah school have proceeded, in holding that the *wakf* of money and *munâfa* is invalid, is that such subjects either possess no stability or permanence, or that they are expended in their application for the purposes for which they are dedicated. But when money is applied in trade, or where profit is derived from investments, the objection which seemed to them to possess so much force, loses all weight, and it is on this ground that modern Shiah lawyers have upheld the validity of such *wakfs*.[1]

The subject of a *wakf* must also be particularly specified, so that, if a person were to say "I have appropriated a house or mansion," it would not be valid unless he specifies which house he means. But if the subject of the *wakf* is not distinctly specified, but is capable of being ascertained by enquiry, such *wakf* would be valid.

It is a condition that the property dedicated should be the *wâkif's*; otherwise the *wakf* is not valid. If the dedication however, is made of a property belonging to another, the *wakf* will be validated by the ratification of the real owner.

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[1] *Jamaa ush Shuttât.*

Wakf of *mushaâ* valid.

The *wakf* of a *mushaâ* or an undivided share in a thing is valid, and possession of it is to be taken in the same way as in the case of a sale.[1]

Conditions relating to the *wâkif* or appropriator.

It is a condition that the *wâkif* should be *bâligh* (adult); that he should be possessed of complete understanding, and be possessed of the capacity to deal with his property, that is, be subject to no inhibition on the ground of incapacity. The author of the *Jawâhir* is inclined to think, and rightly, that the latter condition depends on the former, and in the *Sharh-i-Luma* the only condition required is sound understanding.

"The creation of a *wakf* is like the performance of a devotion, and, therefore, as there is no obligation on a lunatic and an infant who has not attained puberty to perform any devotion, their *wakf* too would not be valid, for the understanding necessary to the comprehension of its nature and effect is wanting. But there is some difference of opinion regarding the question what would be the effect of a *wakf* when made by a boy who has attained puberty at an early age, say ten years." Presumably his act would not be valid, for the law does not presume discretion until the completion of the 15th year.

The *wâkif* can lawfully retain the superintendence of the *wâkf* in his own hands or appoint another; but no condition which would enable the *wâkif* to revoke or cancel the trust is valid or lawful. Nor can he reserve to himself the power of resuming the *mutwallíship* whenever he likes after already appointing one in the office.[2] As it is required that the *nâzir* or superintendent should be a man of honesty and should know how to perform his duty, if the *wâkif* is incompetent or dishonest, that is, neglects the trust or misdeals with it, he may be removed, or another man may be associated with him.[3] When the *wâkif* has appointed no one for the superintendence of the *wakf*, the power of appointing a trustee would devolve on the *cestuis qui trustent*, when the *wakf* is for specific persons who can appoint a trustee on their own behalf, and

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[1] *Jawâhir-ul Kalâm*.

[2] This view seems opposed to the view taken in *Hedaitunnissa's* case, 2 N. W P Reports, p. 410.

[3] This subject has been fully dealt with in dealing with the Hanafi Law. There is no difference between the Hanafi and the Shiah Law on this point.

on the *Hâkim-ush-Sharaa* (Judge), when it is for a public purpose, or in the way of God, or for a continuing and variable class of people.

The *moukoof-alaihim* or beneficiaries.

Concerning the *moukoof-alaih* there are four requisites :—

Conditions relating to the *moukoof-alaihim* or the *cestuis qui trustent*.

(1) He must be existent.

(2) Must be capable of owning property.

(3) Must be *muyyin* or specified.

(4) Must be one in whose favour it is not unlawful to make a *wakf*.

As a corollary to the above principles, the *Sharâya* lays down the following doctrine : "Consequently if one should make a *wakf* beginning with a person not in existence—as for instance, one to be born, or a fœtus not yet separated from the womb of its mother—the *wakf* would not be *sahîh* (valid). But if it were in favour of one not in existence in succession to a person actually in being, it would be *sahîh*." The comment of the *Jawâhir* on this passage is interesting, and brings into prominence the views of the Shaikh (the author of the *Mabsût*) on this subject. "If one makes a *wakf* for a non-existent person at the commencement it will not be *sahîh* [according to the *Sharâya*]; for example, a person makes a *wakf* for his child about to be born, or the fœtus which is not separated from the womb, though (in one aspect) it is *moujood* or existent, and bequests in its favour are lawful and it is entitled to a share, upon the partition of the inheritance, yet a *wakf* is not valid in its favour," probably on the ground that it is not capable of holding possession of the property, "but where a *wakf* is in favour of a non-existent object in succession to an existing object which is capable of acquiring its benefit, such *wakf* is valid."

When a person makes a *wakf* commencing with a non-existent object and then in favour of existing objects, according to the Shaikh and his followers, it would be valid in favour of the existing objects and invalid as regards the non-existing. For example, a *wakf* in favour of an unborn child and after it for the existing children or for the poor will take effect at once in favour of the latter, the invalidity of the *wakf* in respect of the former object which is non-existing, only accelerating its operation in favour of those that are in existence. According to the *Jawâhir-ul-Kalâm*, the great jurist Yehya ibn Muyyid holds the same view, which is

apparently conformable to the opinions entertained by a large body of the *ullâma* (the learned).[1] But a man may make a *wakf* in favour of an existing object, and lawfully condition that upon certain other person or persons coming into existence, the benefit will go to him or them.

For example, a person, who has no children at the time, may lawfully dedicate his property in favour of *A*, and condition therein that upon his having any issue the *wakf* would be for them and for their descendants, in which case the moment a child is born to him, the *wakf* will be diverted from *A*, and the benefit will be applied to such child.[2] What the law requires, is that the commencement in a *wakf* should be made with an existing object, though the remainder may be given to any number of non-existing objects in succession. This, it will be seen, is different from the Hanafi Law, which declares that a *wakf* may commence with a non-existing object, and that until it has come into existence, the *wakf* will be applied for the poor.[3]

A *wakf* for *masâlih* valid.

A *wakf* for *masâlih* or works of general utility or for pious or charitable purposes of a *general* character, in the benefit of which all human beings may participate, is valid. For example, a *wakf* for (constructing or maintaining) bridges and masjids, providing shrouds for the dead, and like purposes is a settlement on all mankind, though a limited number may participate at a time in its advantages; and though no specific individuals may be mentioned as the people for whose benefit such *wakf* is created, it would be valid, because all God's creatures can derive benefit therefrom. Consequently, a *wakf*, the object of which is to confer a general benefit on the public, for example, a *wakf* to a madrassa, or the *wakf* of books to a library and such like, is valid.

A *wakf* in favour of a *harbi* invalid.

A Moslem cannot make a *wakf* in favour of an *alien enemy*, though he may be a blood-relation, but he can make it in favour of a non-Moslem subject (*Zimmi*) of the same sovereign, whether he be a stranger or related to him, for it is the conferring of kindness or charity on a human being, who may be induced to take the right way. The validity of a *wakf* to a *Zimmi* is maintained on the ground that a *sadakah* or charity may be validly given

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[1] *Jawâhir-ul-Kalâm*; *Mabsût*; *Ghunia*. [2] *Sharâya*, p 245; *Mafâtîh*; *Jawâhir*.
[3] *Sharâya*, pp 235 and 236; *Mafâtîh*.

to him. And also because there is precedent for it, "for Safia, the Prophet's wife, made a *wakf* in favour of her brother," who was a Jew. But it does not follow from this that a Moslem can make a *wakf* in favour of a church, a synagogue or any place of non-Moslem worship, for that would be assisting in the propagation of infidelity, which is unlawful and forbidden to Moslems. But a *Zimmi* can make a *wakf* on a non-Moslem place of worship. A Moslem can make a *wakf* for the benefit of *Zimmis* for purposes which are lawful under the Mahommedan Law, such as the repair of their houses, erection of hospitals, or places of refuge, &c. So can non-Moslems make a *wakf* in favour of a Moslem place of worship.

A *wakf* in favour of Moslems generally.

"A *wakf* in favour of fornicators, highway robbers or drinkers of wine is not valid, nor for the copying of what are now called *Tourât* and *Injil* (the Pentateuch and the Christian Gospels) since they are altered and perverted variations. But if such appropriations were made by an infidel, it would be lawful. No *wakf* which is productive of sin is valid."

A *wakf* for the poor.

If a Moslem were to make a *wakf* in favour of the poor, it would be applied primarily to the benefit of the Mussulman poor, and if there happen to be none, then to other poor ; but a *wakf* by a non-Moslem in favour of the poor generally would be applied for the benefit of the poor of his neighbourhood without distinction of creed.

A *wakf* for sinful purposes invalid.

When a *wakf* is made in favour of Moslems generally, all people who are subject to the laws of Islâm, their women and their children, will be included ; the use of the expression "Moslem" excludes those who are not subject to Islâm. A *wakf* in favour of *momins* (those who have the *Imân* or true faith[1]) will be applied only for the benefit of the followers of the twelve Imâms.

A *wakf* in favour of *momins* generally will be applied to such purposes as would be beneficent to them.

If the *wakf* is for *Shiahs*,[2] then according to our present usage it will be applied for the benefit of the *Imâmias*. The term *Shiah* includes the *Jarudiahs*, the *Ismailias*, and in the *Zaidias*.

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[1] "Faith has two meanings—(1) general, and (2) special ; generally it means to accept from the heart those laws which the blessed Prophet has brought ; the special meaning resolves itself into two heads :—(*a*) to act piously, and (*b*) to believe in the *Imâmate* of the Imâms."

[2] *Jawâhir-ul-Kalâm*—"Shiah means a person who propagates the Imâmate of Ali may the peace of God rest with him."

Whenever the *moukoof-alaih* (*i.e.*, the person in whose favour a *wakf* is made) is described by a particular relationship, all those who come within it are held to be included in the benefits of the *wakf*.

So that if the *wakf* is in favour of the *Imâmias*, it is for all the followers of the Imâms. In like manner, when it is for the *Zaidias*, all those who assert the Imâmship of Zaid, the son of Ali (the second,) are included. Likewise, when the connection is a relation to a particular ancestor, all those lineally descended from him by their fathers are included. As, for instance, "Hâshimis," who comprehend all those descended from Hâshim through Abû Tâlib, Hârith, Abbâs and Abû Lahab; or "Tâlibis" who are descendants of Abû Tâlib, on whom be peace, both males and females participate if connected with him on the side of their fathers from a regard to custom, though upon this point there is some difference of opinion.

If one should make an appropriation for an indeterminate class of people like the Banî Tamîm, or *Banî Adam* (mankind at large), it would be valid and should be applied to any of them who can be found, or any human being who asks for help.

Wakf in favour of neighbours.

If a person should make an appropriation for (his) neighbours (*jîrân*), a reference should be made to custom for determining who are to be thereby comprehended.

Some say, however, that any one whose house is within forty cubits is a neighbour, and this opinion is good or well supported, while others maintain that the meaning of the term extends to all the occupants of forty houses on either side, but this opinion is now abandoned.

A *wakf* in favour of a *maslahat* that has ceased to exist how to be applied.

If one should make a *wakf* for a *maslahat* or object of general utility, but that has ceased to be used, it will, according to the approved doctrine, be applied to any good or pious purpose. It will, however, be better to apply the same with reference to the true intentions of the *wâkif*. So the *wakf* for a masjid will (in case of the intended masjid not being in existence) be applied to another masjid, and that for a Madrassa to another like Madrassa, and so on, regard being had to the same description of object as was intended by the *wâkif*.[1]

[1] *Mafâtîh.*

When a *wakf* is made for a good purpose without any specification of the object it will be applied to any good purpose by which an approach is made to Almighty God.[1]

So also in the *Sharh-i-Luma* :—"If one makes an appropriation in the way of God, then it will be applied to every purpose by which an approach is made to God, because from 'the way' is meant the path of God, that is, the path of reward (in future life) and the reward and pleasure of God; this will include, therefore, helping the needy, building mosques and repairing roads, supplying shrouds to the dead, whatever brings blessings; some say, it includes holy warfare, others that it includes *Hajj* and *Umrah* (lesser pilgrimage). But the first view is correct.[2] In the same way, if one makes an appropriation in the way of charity or in the way of *sawâb* (reward), it means the same thing, and the meaning will not be split into three parts. Some (jurists) have said that 'the way of rewards' means the poor and indigent, and commencement should be made with his poor relations, and from the 'way of charity' is meant the poor and indigent, and travellers and debtors who have become indebted in pious acts and the ransoming of slaves, but the intention of the *wâkif* should be regarded."[3]

If one makes a dedication for charity generally, without any specification of the purposes, it will be applied (or expended) on the poor and all purposes by which an approach (to God) might be made, like conferring benefit on students, building mosques and schools and bridges and *Mashâhid*, the assistance of pilgrims, supplying shrouds for the dead, and it is allowable to spend for the general benefit of Mussulmans.[4]

In the *Jawâhir* this principle is stated thus :—"If a person constitute a *wakf* for a *maslahat* such as a masjid, a bridge or some object of a similar character and all traces of its use and effect have totally vanished (*lit.* have become totally effaced or annulled), in such a case the income of the *wakf* property would be expended on good purposes generally. Preference, however, would be given to an object approaching in character as nearly as possible to the object of the original dedication." It will be seen from this that the *cy près* doctrine is carried much further under the Shiah

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[1] *Mafâtîh* [2] *Sharh-i-Luma.* [3] Comp the *Jawâhir.* [4] *Riyâz-ul-Ahkâm.*

Law than even under the Hanafî Law. And this will appear more clearly from the following dictum: "If a person were to make a dedication generally for benevolent purposes,[1] then without any difference of opinion, the *wakf* property will be applied for the benefit of the poor and indigent and for all pious acts and objects which may be the means of approaching the Deity; *birr* or charity is a word which comprehends all good and pious actions (*khâir*), such as the relief of the *wâkif's* kindred, the help of the poor, the assistance of the weak, the improvement of the condition of the Mussulmans, the performance of *Hajj*, *Jehad*, &c."[2]

Ibn Junaid's view.

With the exception of Ibn Junaid, most of the writers are agreed in holding that a dedication, when the object is not mentioned either expressly or impliedly, is void. Ibn Junaid, however, holds otherwise. According to him and his followers where a *wakf* is created but the beneficiaries are not named, the *wakf* will be applied for purposes of *birr* and *ihsân* (charity and good acts). But when a person declares a property a *sadakah* in the way of God (which is another way of saying it is a *wakf*), though he may not mention the people for whom the *sadakah* is constituted, yet it would be applied by *consensus* to the benefit of those whom God has declared to be the recipients of the ordained alms, *i.e.*, the poor and the indigent, the needy and helpless. Virtually, the views of Ibn Junaid are not opposed to those of the other jurists, for they also hold that in the absence of any express mention of the special object, where the *wakf* is clearly for pious and good purposes, it will be applied to such purposes as are for the good of Mussulmans generally.[3]

A *wakf* for an indeterminate object invalid.

If the *wakf* is created for an indeterminate object it is invalid, *e.g.*, if it is for one of two mosques or for one of two Imâmbaras, it is void.

A *wakf* in favour of relations generally.

If a person make a *wakf* for his children or his brethren or his relations generally, the males and females, the nearer and the more remote will share equally[4] unless the order in which they should participate is specified, or it is expressly stated that it is for the males, when the shares will be distributed in accordance with the rule laid down. Where a *wakf* is for paternal and maternal uncles

[1] *Jauâhir-ul-Kalâm* [2] *Ibid.* [3] *Ibid.* [4] *Jâmaa ush Shattât.*

together, they share equally. A *wakf* for those nearest to the *wâkif* will be primarily applied to his parents and descendants, then to his brothers and sisters and their descendants together with the ascendants, and lastly, and on failure of these, to paternal and maternal uncles and their descendants. As in the Hanafî system, so also under the Shiah Law, the directions laid down by the *wâkif* if not sinful, should be given effect to so far as possible. But if any of the provisions are impracticable, the *Hâkim-ush-Sharua* can give directions so as to make them conformable to the exigencies of the *wakf*.

Section III.

Essentials Requisite to the Legality of Wakf.

Essentials requisite to the legality of a *wakf*.

There are four essential requisites on which depends the legality of a *wakf*.

(1) That it must be perpetual.

(2) That it must not be contingent.

(3) That possession must be given of the thing dedicated, or, more properly, the property should cease to be the property of the donor.

(4) That the right of the donor should be entirely divested therefrom.[1]

With reference to the first condition, the view generally adopted is, that in order that a *wakf* may take effect in *perpetuity* it must be for an object or objects, which, individually or collectively, would presumably last always. A *wakf* for *masâlih* or works of general utility or for pious and benevolent purposes generally, is valid, for any particular *maslahat* which is for the benefit of all mankind is lasting in its character, as it is for the benefit of humanity at large. A charitable purpose is also perpetual in its nature for there are always poor in existence. In fact, any continuing object of *birr* and *ihsân* is sufficient for a perpetual *wakf*; for example, a *wakf* to supply water or *sherbut* to the congregation in the mosques or imâmbaras, to provide shrouds, to light the lamps in a place of worship, to keep up the library of a Madrassa, towage a sacred war, to support the poor Syuds of Kerbella,

[1] *Haji Kalb Hossein* v *M. S. Mehrun Bibi*, 4 N.-W. P., 155.

to keep the acqueduct there in repair or any sacred place and such like.

Wakf in favour of descendants and on their failure for the poor, valid by consensus.

So, also, where a *wakf* is created for specific objects which are liable to failure, if the ultimate reversion is reserved for the poor or for any object of utility or permanent worship such as a mosque or imâmbara, the *wakf* is valid. For example, if a *wakf* is created for the descendants of the *wâkif*, and upon their extinction, it is provided that the usufructs hould be applied to the poor, or towards a particular mosque, the *wakf* is valid "without difference."

But when the *wakf* is for Zaid, and nothing is said as to how it should be applied after Zaid's death, and there is nothing from which the intention of the donor can be inferred as to the future application of the proceeds of the *wakf*, one body of jurists have held that, in that case the *wakf* will operate only as a *umra* during Zaid's lifetime, and on his death will, according to the generally received doctrine, revert to the *wâkif* or his heirs, as the case may be. Similarly, if the *wakf* was for Zaid and his descendants, and no other (continuing or permanent) purpose was mentioned, to which the income should be applied upon the extinction of Zaid's posterity, the *wakf* will take effect as a *hubs* in their favour, giving them a limited estate so long as they are in existence. And on the extinction of Zaid's descendants the property will revert to the heirs of the *wâkif*. According to another school of jurists, the remainder in either case will be for benevolent purposes in general.[1] These jurists are in agreement with Abû Yusuf.

If a property is made *wakf* or *hubs* for two persons, one of whom dies, the survivor will enjoy the benefit of the property during his lifetime. Another view is, that the moiety of the deceased will revert to the donor. But "the former seems more approved."

A *wakf* for the donor's son for one year or for his lifetime with the reversion for the poor is valid (as a perpetual *wakf*) by *general consensus*.

If a person were to constitute a *wakf* for his sons in the following manner, that is to say, for one year for Amr, the next year for Zaid and so on, and after them for the poor, in the following manner—for their learned one year, for their pious in the second

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[1] *Jawâhir-ul-Kalâm.*

year, and their *mashaikh* in the third year, such a *wakf* is valid and will be given effect to.

A contingent gift is invalid; for example, if a man were to say "This is *wakf* when Zaid comes or when the first of the month comes." Contingent *wakf*.

SECTION IV.

DIVESTMENT OF THE WAKIF'S INTEREST.

On this subject, the Shiahs differ from the accepted Hanafi doctrines and approach closely the views expressed by Mohammed. Seisin under the Shiah Law.

"Seisin is a condition for the validity of the *wakf*," says the *Sharâya*, "so that if the *wâkif* should die or become insane before he has completed the *wakf*, it will be invalid." The nature of the seisin will depend on the nature of the subject of the *wakf*, and the objects for which it is dedicated. If the dedication is for specific individuals who are competent to take possession of the *wakf*, seisin is essential. But it does not follow from this that there should be actual delivery of possession. What is required is that there should be a transmutation of proprietary right. If a trustee is appointed, he should take possession of the property. If the *wâkif* himself is the *mutwalli*, he should hold as such.

Where the *wakf* is for pious purposes or the benefit of mankind in general, no seisin is necessary. The *Sharâya* states the principle thus:—"Where a *wakf* is made for the poor or for the learned in law, a superintendent (*kyyim*) must be appointed to take possession of the *wakf* property—while in the case of a *wakf* made for a *maslahat* or useful purpose, the creation of the trust implies that change of possession which the law requires, the condition of acceptance being entirely dispensed with, and as to possession that of the *nazir* or superintendent is sufficient. If a person should appropriate a masjid or place of worship, the dedication is valid though only one person should pray therein. In like manner, if a person dedicate a cemetery, the same becomes valid, by the interment therein even of a single corpse. But though people should pray in a masjid or bury in a cemetery without the formal

words of *wakf* being pronounced, neither would pass out of the property of the owner, until it is formally dedicated."[1]

Where appropriate words were used, but no change in the character of the possession has taken place, the *wakf* would not be operative.

Wakf for the *wâkif's* minor children.

The possession of the *mutwalli* appointed to look after the *wakf* would be sufficient, and the *wâkif* may be *mutwalli* himself.[2] Where the *wakf* is for the *wâkif's* minor children, no express transmutation of proprietary right is necessary, and if the *wâkif* remains in possession, the *wakf* nevertheless is valid. His possession would be on their behalf;[3] so also in the case of a grandfather. Similarly, with regard to the father's and grandfather's executor.

A *wakf* in favour of one's self not valid under the Shiah Law.

With reference to the fourth condition, it will be observed that there is a marked difference between the Shiah and Sunni Law on the subject. According to Abû Yusuf, a *wâkif* is entitled to reserve for himself an interest in the *wakf* property, or as he puts it "to eat thereout." Under the Shiah Law, in order that a *wakf* may be valid, it is necessary that there should be no reservation of interest in favour of the *wâkif*. "If a person were to make a *wakf* for himself," says the *Jawâhir*, "it would not be valid; this is without any difference of opinion. Similarly, a *wakf* commencing with the *wâkif*, *e.g.*, for the *wâkif* and then for another, will be invalid, though some, among them the Shaikh, have held that it would be invalid only as regards himself. The former opinion

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[1] "So if it (the appropriation) is restricted to a particular time, or made dependent on some quality of future occurrence, the *wakf* is void. Such also is the case when it is made in favour of persons who will probably fail. As for instance, if one should make a settlement on Zaid with a restriction to himself, or extend it to generations that would probably fail, or if he say generally for his successors without mentioning what is to be done after they fail—in these cases it is maintained by some that the *wakf* would be entirely void, but others insist that due course should be given to the purposes actually named, and this is approved. Then upon their failure the property would revert to the heirs of the *wâkif* or appropriator, but some of the doctors maintain that it reverts to the heirs of the *moukoof-alaihi*, or the person in whose favour the *wakf* is made. The first opinion, however, is the most approved."

If one should say, "I have appropriated when the beginning of the month should come, or if Zaid will arrive," the appropriation will not be valid.

[2] *Jâmaa ush-Shittât.* [3] According to Mohammed Ibn Muslim.

seems to be generally adopted." "Similarly, if the *wakf* were made in favour of another with a condition for the payment of the *wâkif's* debts and current expenses, it would not be valid. This is supported by the answer of Abu'l Hassan (the Caliph Ali) (may the blessing of God rest on him) to the letter of Ali bin Sulaiman, who wrote to the Imâm thus :—'May I be your sacrifice; I have no children, and I have some lands which I have received from my father, I intend to dedicate the same for my poor and weak brethren; if I make a *wakf* in my lifetime, can I eat therefrom whilst I live?' To this the reply was, 'I have received thy letter and learnt its purport, if thou shouldst make a *wakf* of thy lands and make a condition to eat therefrom, it will not be valid. If thou hast heirs, sell the lands and give a portion (of the proceeds) to the poor, or reserve a portion which may be sufficient for thy support during thy lifetime and dedicate the remainder.'"

The following from the *Jâmaa-ush-Shittât* throws considerable light on this subject.

"*Q.* When a person makes a *wakf* of some property in this way, *viz.*, 'I have constituted this a *wakf* in perpetuity, and its *towliat* I have reserved for myself during my lifetime, and after my death for the eldest and fittest of my children in succession, generation after generation (*batnan-baad-batn*) and have appointed that the rents and profits of the *wakf* property after paying all royal taxes and costs of collection, I shall apply for my expenses; and after my death, one-tenth of the said rents and profits, after deducting the taxes and costs should be given to the *mutwalli* for his remuneration, and the remainder divided among my children equally, but the share of my daughters shall not go to their children;' and some time after the *wâkif* died leaving three sons and the sons of predeceased sons, will his grandsons take any interest in the *wakf*, &c, ?"

"*A.* This *wakf* is void *ab initio*, for the *wâkif* reserved to himself during his lifetime the profits of the property. It is one of the conditions for the legality of a *wakf* that the *wâkif* should take out the subject of the *wakf* from himself. Therefore when a *wakf* is made on his own *nass* (self) it is *bâtil*, though there are others mentioned after himself as the beneficiaries thereof. With reference to the voidableness of the *wakf* as to himself there is

consensus ; as regards the voidableness of the remainder, the general opinion is that it is so, for the arguments in support of the validity of the *wakf* in favour of the others are weak. Similarly, if he makes a *wakf* and stipulates to defray his every-day expenses or to pay his debts thereout, it would be invalid. *But a condition that his people and children and family should eat out of the wakf is valid*, as is apparent from what was done by the Prophet and his daughter (may the blessings of God rest on them both), and in this respect there is no difference between those who are entitled to maintenance and those who are not. In the same way, it is lawful to fix the allowances of *mutwallis* and *nâzirs* or to give them permission to eat out of the *wakf* and supply others with food. In the *Masâlik* it is clearly laid down that when the *wâkif* is himself the *mutwalli*, it is lawful for him to eat out of the *wakf* [as a *mutwalli*] and this 'eating' does not fall within the category of a provision for the *wâkif's* own benefit. The author of the *Kifâyèh*, however, doubts whether the *wâkif* can 'eat out' of the *wakf* in this way. It must be admitted that considerable difficulties surround this point, and on this account many people question the lawfulness of the *wâkif* taking any share even as *mutwalli*. For example, a person makes a *wakf* of some property on his children, and conditions that the *towliat* should remain in his hands during his lifetime, and after his death it should go to the fittest among them, and the *wâkif* also conditions that nine-tenths of the profits of the *wakf* should belong to him by right of *towliat*, and the remaining tenth should be given to the children, and that after his death one-twentieth should be given to the fittest of the children by right of *towliat*, and the balance of the income be divided among them equally,—in such a case as this, my view is that the *wakf* would not be valid. Admittedly, it is lawful for the *wâkif* to retain the *towliat* in his own hands during his lifetime, and also to condition that the *mutwalli* should feed himself and others from out of the *wakf*. From these two theses some of our jurists have drawn the conclusion that where the *wâkif* has made a condition for the *mutwalli* for the time being to feed himself and others out of the *wakf* and the *wâkif* happens to be the *mutwalli*, it is lawful for him to eat thereout, though a few have doubted the lawfulness of his doing so. The result is, that the legality of the *mutwalli* eating out of the *wakf* depends on his quality as *mutwalli*, and not upon the *wâkif*

Wakf in favour of one's children and descendants valid.

being the *mutwalli*. And the jurists are agreed that where anything has been fixed for the *mutwallis* generally, it is lawful for the *wâkif*, when he happens to be the *mutwalli*, to take so much as is fixed for the other *mutwallis*; but I have nowhere seen that it has been held that a *wâkif* whilst he is a *mutwalli* can lawfully take for himself anything he likes out of the *wakf* simply because he himself is the *mutwalli*. The meaning of this is, that the retention of such a general power which would authorise his taking the largest share for himself, leaving almost nothing for the beneficiaries, is contradictory to the condition which requires a complete divestment of all proprietary right on the part of the *wâkif*. This, of course, does not apply to those cases when a person has made a *wakf* for the indigent and has himself become poor, or where he has made *wakf* for the learned and has himself become learned. In such cases, the *wâkif* would be entitled to participate in the benefits of the *wakf*, and it makes no difference whether at the time of the *wakf* he is a *fakîr* and learned, and whether he becomes so afterwards. But if he makes a condition that he, as a *fakîr*, should participate in it, it would not be valid. The result is that where a *wakf* is made for a general purpose *(jihat-i-ââmma)*, a *wâkif* may lawfully participate in it."

But the *wâkif* when *mutwalli* can lawfully take the allowance reserved for the trustees generally.

From the above passage, it is clear that the *wâkif* can lawfully take the allowance fixed for the *mutwallis* generally when he himself holds the office.

Wakif may take the allowance fixed for the *mutwalli*.

There is another case given in the *Jâmaa-ush-Shittât* which deserves equal attention with the above as explaining the question how far a *wâkif* may reserve to himself any interest in the *wakf* property.

"*Q.* One Zaid makes a *wakf* of six dams of a certain property and six dams of a certain mill and executes a *wakfnamah* which is attested by one of the *mujtahids* of the time who is dead. The purport of the *wakfnamah* is as follows:—out of the *wakf* four dâms should be for the benefit of the *wâkif's* male children, generation after generation; should there be no male children then for the female children in perpetuity. Two dams to be devoted to the following purposes, *viz.*, for the expense of the sacred months of Rajab, Shâbân and Ramzân, in such a way that the good resulting from such disbursements may be for the soul of the *wâkif*, and during the first two months they should entertain fifteen Koran-

readers, each of whom should read four parts of the Koran; and after the death of the *wâkif*, should offer prayers and fastings for the soul of the *wâkif*, and that during his lifetime the *wâkif* should be *mutwalli* thereof, and after his death his eldest son should be the *mutwalli*, and so on; that during his lifetime he should take $\frac{2}{10}$th of the proceeds by virtue of the office of *towliat*, and $\frac{1}{10}$th should be given to the children, that after his death $\frac{1}{10}$th should be given to the *mutwalli*, and the rest distributed among his children. Is such a *wakf* valid?"

"*A.* This question cannot be answered without its being discussed in three aspects—

"If the document, the purport of which has been given above, forms the only evidence of the conditions of this *wakf*, then it must be pronounced to be wanting in legality on several grounds; (*a*) with reference to the dedication of the two dams, it would appear that it does not come into operation until after the death of the *wâkif*, for the directions given as to the mode of application of the proceeds thereof take effect only as a testamentary provision upon his death, since the *wâkif* declares that the income thereof should be applied in entertaining Koran-readers, feeding the poor, performing prayers, &c., upon his death for the benefit of his soul. But it is a condition for the legality of a *wakf* that it should have operation immediately. In the present case, the *wakf* of the two dams is dependent upon the death of the testator; in fact there is no one entitled to the benefit of that portion unless it be presumed that it is the *wâkif* himself, which would be invalid. And if it were said that the proceeds of the two daneks should be applied to charity in general until the death of the *wâkif*, and after his death should be applied to the Koran-reading, &c., mentioned by him, this is clearly opposed to the purport of the *wakfnamah* itself. The *wakf* therefore is clearly invalid, as it is a *wakf* virtually in one's own favour."

Similarly, if one were to make a *wakf* and condition therein that out of the income thereof his debts should be paid, such a *wakf* would be invalid. But when a person conveys his property in trust to sell the property, and out of the proceeds to pay his debts and to invest the remainder for religious or pious purposes or in erecting a religious building and maintaining religious observances therein, it would be a valid dedication.

If a person were to make a settlement on himself and the poor, half the property would be validly dedicated, and with reference to the remaining half the *wakf* would not take effect. In the case of *Hajee Kalb Hossein* v. *Musst. Mehrun Bibi*,[1] the Allahabad High Court enforced this principle. The decision in this case is so important that it may be usefully set out here *in extenso*.

A *wakf* in favour of one's self and the poor.

Hajee Kalb Hossein v. *Musst. Mehrun Bibi.*

In the year 1851 one Mussamut Sahibzadee executed a deed by which she appropriated certain monies and estates of which she was possessed to certain religious and other purposes in the following manner, *viz.*, she appropriated two-thirds of the income to herself during her lifetime for her necessary expenses, and the remaining one-third of the income she declared divisible into fifty-five shares, of which some were to be distributed to certain persons therein mentioned, charged with religious duties, and the residue to be expended on religious ceremonies, which were specified. She appointed herself trustee, and declared that the fifty-five shares as detailed would remain appropriated during her trusteeship, and that neither she nor her assignee nor representative should have power to transfer the property so appropriated; and she declared further that after her trusteeship, the trustee who might succeed to her should, after discharging Government revenue and other outgoings and charges of management, divide the balance of the income into 165 shares, and retain 55 shares on account of his trusteeship, and apply the remaining shares as therein directed to the payment of pensions to persons therein mentioned, for the performance of religious duties, and to certain specified religious purposes. By this deed one share out of the 55 shares in the income of the property was to be paid to the plaintiff, who was the respondent in the High Court, during the lifetime of the settlor, and 10 shares out of the 165 shares into which the income was to be divided on the expiry of the settlor's trusteeship were to be paid to her, and after her death, to her heirs, "generation after generation," subject to the condition that they performed certain religious duties therein particularised.

The settlor died in 1872, and the respondent, having failed in obtaining payment of the shares appropriated to her by the deed of

[1] 4 N.-W. P. H. C. Reports, p. 155.

1851, instituted a suit, to recover her allowance thereunder. The Lower Courts decreed the plaintiff's claim. In special appeal it was contended *inter alia* that the respondent ought, prior to the institution of the suit, to have obtained sanction of the Court under section 18, Act XX of 1863. With reference to this objection the High Court held as follows :—"That section only prescribes the necessity for obtaining sanction when suits are instituted under that Act. This suit is not instituted under that Act: the respondent has instituted this suit to recover a direct pecuniary interest created in her favour by the deed of 1851. The Act, while it empowered persons to sue, whose right to sue independently of the Act may be doubtful, did not deprive persons in the position of the respondent of the right to sue, which they have independently of the Act, nor did it impose on them the necessity of obtaining sanction of the Court for the institution of this suit. Moreover, the Act refers to foundations to which, at the time the Act was passed, the provisions of Regulation XIX of 1810 were applicable; and it appears to us that to the trust created by the deed of 1851 the provisions of that Regulation were not applicable. The management of the trust estate had never been assumed by the Government officers, nor was the nomination of the trustee at the time the Act was passed vested in the Government or a public officer, nor was the nomination of the trustee subject to the confirmation of Government or any public officer. The nomination of a trustee may hereafter in certain events become vested in a public officer, but these events have not yet happened. We, therefore, overrule this objection."

The learned Judges then proceeded to deal with the principal objection in the following terms :—"It is contended that the deed of 1851 was not a valid deed of *wakf* according to the tenets of the Imâmea sect, first, because Shahibzadee Begum remained in possession of the property as proprietor up to the date of the gift in 1867, and secondly, because she reserved to herself a benefit out of the *wakf* property, in that she reserved two-thirds of the income for the necessary expenses during her lifetime. To constitute a valid *wakf* according to the doctrine of the Shiahs, it must be absolute and unconditional, and possession must be given of the *moukoof*, or thing appropriated, and it must be taken entirely out of the *wâkif*, or proprietor himself. Firstly, then we have to consider whether

possession was given of the appropriated property. The law allows the appropriator to appoint himself *mutwalli*, consequently inasmuch as the settlor appointed herself *mutwalli*, and by her conduct subsequent to the execution of the deed of 1851 indicated that she held the appropriated property in the trust declared in that deed, we hold there was sufficient proof of possession to satisfy the requirements of the law; but we also hold that as to two-thirds of the property, the deed of 1851 did not create a valid *wakf*. The settlor reserved to herself the benefit of the income of two-thirds of the appropriated property, so much of the property she settled on herself for her lifetime, and consequently this case is not distinguishable from the cases mentioned in the *Sharâya*. It remains to be determined whether the invalidity of the deed of 1851, as a *wakfnamah*, in respect of the two-thirds, renders it altogether invalid, or invalid only to the extent of the two-thirds. The *Sharâya* declares that where a settlement is made on another with a condition for the payment of the *wâkif's* debts, or necessary expenses, such a settlement is invalid. In that case the reservation is of an indefinite benefit; in the present case one-third of the income, a definite share, was, as it appears to us, absolutely and permanently appropriated to purposes other than the temporal benefit of the settlor; and entirely taken out of the settlor, and inasmuch as the *wâkif* of a *mooshoa*, or undivided share in a thing is valid, we feel ourselves at liberty to hold that the deed of 1851 was valid to the extent of one-third of the income of the property; and that that share of the property is available for the satisfaction of the trust declared by the settlor to take effect after her trusteeship. Consequently the claim of the respondent must be reduced by two-thirds."

Though it is not lawful for a *wâkif* to create a *wakf* in his favour, yet if the *wakf* is in the way of God "or for a pious or religious purpose, for example, a masjid, it would be lawful for the *wâkif* to derive benefit therefrom, *viz.*, to participate in the prayers held there and to offer his prayers in the place. Similarly, in the case of a *wakf* of a public character, such as a bridge or hostel (*musâffirkhânèh*)." In considering the validity of a *wakf* which is not of a public nature, and in the benefit of which the *wâkif* participates to a certain extent by implication, the important question to determine is, whether the *wâkif* intentionally made a reservation in his favour of that interest. Apparently,

the participation of the *wâkif* to a certain extent, which does not show that the *wakf* was a mere device for tying-up the property for the *wâkif's* own benefit would not be invalid. This view is submitted as the result of the difficult and somewhat casuistical arguments discussed in the *Jawâhir*.

If a person create a *wakf* and make a condition that the property should return to him in case of necessity, the condition will be valid and the *wakf* will be void, the settlement taking effect as a *hubs;* when the need arises the property will revert to the owner. The need must be such as is considered valid under custom and usage, but not anything technically called a need. When the property once reverts to the donor the right of alienation will attach to it.[1]

A condition to the effect that the *wâkif* should have the power of excluding any one he liked from the benefit of the *wakf* is invalid. But a condition to introduce fresh beneficiaries is valid, excepting in the case of a *wakf* in favour of children.

When a *wakf* is for one's children generally, children born after the *wakf* will be included, though there may not be any express condition to that effect. But when a *wakf* is made for children of any property which is made over to them, after-born children will not be included unless it has been so expressly provided.

When a *wakf* is made for the benefit of one's infant children, the donor will not have the power of so varying the terms of the *wakf* as to include outsiders in its benefit unless he has expressly reserved power to that effect.

Possession.

The seisin which is required is on behalf of the first donee or *moukoof-alaih* and all regard to possession ceases in the subsequent steps. As already stated, it is not necessary, however, that there should be any actual transfer of possession; what is required is a change in the character of possession. For a *wâkif* may make a *wakf* and remain in possession as trustee for the beneficiaries of the trust; such retention of possession would not affect the legal character of the *wakf*.

As the provision requiring seisin on the part of the first *cestui qui trust* relates to a change in the character of the possession,

[1] *Sharâya-ul-Islâm.*

constructive delivery of possession is sufficient. As already pointed out, when dealing with the Hanafî Law, when the possession is already in the hands of the *cestui qui trust* or trustee no formal delivery of seisin is necessary. The former possession is sufficient to create a valid *wakf*. For example, if *A* dedicate a property which is in his possession through an agent *B*, and appoint *B* as the *mutwalli* or trustee thereof, no further delivery of possession is necessary, the relation of *B* as agent ceases with the creation of the *wakf* and the property remains in his hands as a trustee.

The passage in the *Sharâya*, therefore, that "the seisin which is required is of the first *moukoof-alaih*" must be read with due regard to the other circumstances. Nor is the seisin of the donee or donees themselves necessary. Any one who is actually or constructively their agent may take possession of it. Where a *wakf* is made for a charitable or pious purpose of a public character, as in the case of an appropriation for the poor, for lawyers, for students and such like, it is out of the question for the entire body of beneficiaries to obtain seisin of the property; the possession of the Hâkim, who is the public curator, or of the superintendent appointed by the *wâkif* or by the Hâkim for that purpose, would be sufficient.

The *wâkif* can validly appoint himself or another person as the *mutwalli* of the *wakf*. In the case of a *wakf* in favour of an object of public utility (*maslahat*) such as a bridge, a mosque and such like, acceptance is not a condition nor seisin of any specific person deriving benefit from such *maslahat*.

The seisin of a *mutwalli* or superintendent, curator or *nâzir* appointed for the purpose of managing or looking after the maintenance of the *wakf* is sufficient. When the *wâkif* has constituted a *mutwalli* or curator no reference is necessary to the Hâkim. In case of any question as to the validity of his appointment, the Hâkim, as the guardian of the interests of the Mussulman public, will appoint a *nâzir*.

When a *wakf* is made for a *masjid*, *i.e.*, when a place or building is dedicated for prayers, it will be valid if prayers have been offered there even by one man. Similarly, a cemetery would become dedicated by the burial of one corpse. It must, however, be borne in mind that the intention of the appropriator must be apparent. For example, the permission of the owner of a house

to another person to pray therein, or even the continuous offering of prayers in a private house, will not convert the residence into a *masjid* or place of worship. But if a person declares that he dedicates his house as a mosque and after that allows another person to pray therein, that would be sufficient to create a valid *wakf*.[1] Again, if a person were to erect a building of the customary type of a mosque, and allow another to offer his prayers therein, it would be sufficient, though there may be no express declaration constituting it a *wakf*. Mere interment of a corpse on a land or offering of prayers in a building without express or implied declaration of intention on the part of the grantor, will not be sufficient to constitute the land or building a valid *wakf*.

If a father or grandfather make a *wakf* of a certain property belonging to him for his child or grandchild, and retain possession of it on behalf of such child though a *mutwalli* has been appointed, such possession is lawful, and will be regarded in law as the possession of the *cestui qui trust*.

The beneficial interest in such properties as are dedicated for charitable or pious purposes appertains to God. For there is no *mâl* without a *mâlik*, and inasmuch as there is no specific beneficial owner of such public trust, the property impliedly belongs to the Deity.

Wakf on children.

Where a *wakf* is made on one's children's children, (*awlâd-i-awlâd*), the children of daughters will participate with those of the sons.

Where a *wakf* is made for one's children and *their* children, the descendants of the third generation will not be included, unless it can be gathered that the donor intended all his descendants to share in the benefit of the *wakf*.[1]

When a *wakf* is made for one's *awlâd* and *awlâd* of *awlâd* and their *awlâd*, all the surviving descendants share equally *per capita*, unless it is laid down that they should take *batn* after *batn*, when the *batns* will take in succession.

When a *wakf* is made for children generally, it will enure to the benefit of all the descendants of the *wâkif*; and upon their extinction *alone* the benefit of the *wakf* will accrue to the poor.

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[1] *Jawâhir-ul-Kalâm.*

When a *wakf* is made for a *masjid* which becomes ruined, and the village or *mahallah* in which it is situated becomes deserted, yet the *wakf* will not cease, and the *wakf* property, will not revert to the *wâkif* notwithstanding that, barring the traces of the building, nothing else remains from the *masjid*. This doctrine is accepted " among us " without a difference.

When a building becomes ruined, so that there are no traces left of it, the land on which it was situated will not go out (of the category) of *wakf* and it cannot be sold. The ruin of the building will not destroy the *wakf*, the characteristic of which is perpetuity.

When it appears that the sale of a *wakf* property will be to the advantage of the *wakf* or of the beneficiaries by investing the sale proceeds in some other more profitable property, the *mutwalli* may validly sell the property. When disputes have arisen among the beneficiaries, and it has become apparent that by keeping the property in its original form considerable injury will accrue to the *wakf*, sale is allowed. The *wâkif* is authorised to make a proviso to the effect that the *mutwalli* shall have the power to sell the property and invest the proceeds to better advantage.

When a *wakf* is made for the poor it will be applied to the poor of the city and such of those as are forthcoming to avail themselves of its benefit. The *mutwalli* has not to search for them and distribute the proceeds among them. Imâm Abû Jaafar II declared in answer to an enquiry by Abû Ali ibn Sulaiman that when a land has been dedicated to the poor descendants of so-and-so, it will be applied to the benefit of such of them as are living in the city where the *wakf* is situated, or such as come forward to claim it, and the *mutwalli* is not bound to go in search of them.

A *sadakah* cannot be revoked after possession has been once given, for it is equivalent to a *hiba-bil-ewaz*. The object of a *wakf* as well as of a *sadakah* is to obtain the favour of God and when it is made the favour is obtained, so it cannot be revoked.

A *sadakah* cannot be revoked.

CHAPTER XV.
THE MALIKI LAW RELATING TO WAKFS.

Section I.

General Observations.

In his introduction to the Chapter dealing with the Mâliki Law of *wakf*, M. Santayra makes the following observations :—"The institution of *wakf* dates from the time of the Prophet. Bokhâri reports in his traditions that Omar Ibn al-Khattâb having become the proprietor of an estate at Khaibar, came one day to the Prophet and told him he thought that estate a precious possession and asked what he should do with it to please the Almighty and deserve His grace ? 'Make a *wakf* of it,' said the Prophet, 'and distribute the revenue thereof in charity.' Omar carried this into effect and the estate made *wakf* could not be sold, given away, mortgaged, nor taken as heritage."

"Originally a *wakf* was a donation in favour of charity by an act of piety involving the immediate relinquishment of the property in favour of the charity to which it was devoted, but the desire to increase the number of these grants induced the successors of the Prophet and the heads of the orthodox schools to authorise the founders to designate intermediate beneficiaries according to their own wishes.[1] After this, it is intelligible that the principle of *wakf*, while retaining its pristine character, would become the means for a Mussulman proprietor to prevent his property from following the regular line of succession and to take away all rights from his wife, his mother, daughters and sisters and to maintain what he possessed in the male line. All *wakfs*, however, do not cause disherison of daughters and wives ; there are some, on the contrary,

[1] This is not quite accurate, for the institution of family *wakfs* is founded on the direct prescriptions of the Prophet.

that sanction equal distribution without distinction of sex, and others more numerous in which the devolution is directed to take place as ordained by the Koran. In this latter case the *wakf* has but one aim that of imprinting upon the constituted property a religious character, thereby protecting them from confiscation or the covetousness of the sovereign.[1] Concerning the law relating to *wakfs*, the two schools, the Mâliki and Hanafi, followed in Algeria have both common and separate rules. The Mussulmans to whichever sect they belong may adopt the rules of either, but they cannot submit their constitution to the prescriptions of both united."[2]

All those who have the right to make a gift may also make a *wakf*. The settlor consequently must be :— The *wâkif's* capacity.

1. Free and not a slave.

2. Sane.

3. In good health, or, to be more exact, he must not be suffering from a death-illness. A *wakf* by a "sick" person is similar to a legacy. It is null when made in favour of an heir, and reducible to a third if made in favour of a person, who has not the right of inheritance.

"A *wakf* made in favour of heirs," says Khalîl ibn Ishâk, "by a person during the illness of which he dies is null and void ; but a *wakf* made in favour of descendants of the direct line [who are not heirs] is valid if it does not exceed the third of the inheritance."

4. Possessor of the property made *wakf*, that is to say, he must have dominion over it.

The Courts of Justice have consequently annulled the *wakf*— (*a*), when the donor died heavily involved in debt, and the property endowed had to be sold to discharge his debts ; (*b*), when the debts of the settlor exceeded his assets ; (*c*), when the grantor was not in proprietary possession of the property when he made the *wakf*.

5. *Sui juris*, having the full exercise of his rights. (A Mâliki) married woman, therefore, cannot make a *wakf* of more than one-third of her property without the consent of her husband.

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[1] Comp Mr. Harrington's remarks in the case of *Wasik Ali Khan* v *Government*, 6 Sel. R., p. 110

[2] 2 Santayra, p 374 The following principles are taken in the main from this work.

The beneficiary.

A non-Moslem who fulfils the conditions above-mentioned can make a *wakf* of the whole or part of his property. The law makes but one exception to the liberality of those who do not follow the Islâmic faith; it forbids their constituting a mosque as beneficiary of their *wakf*. "It is unlawful for an unbeliever," says the text, "to make a *wakf* in favour of a mosque."

A *wakf* can be constituted in favour of every person who can possess property; it can also be made in favour of unborn children and non-existing objects. Accordingly, the settlor can designate as beneficiaries :—

(*a*) A Mussulman, or a non-Moslem provided the latter inhabits a subjected country; this is the result of the expression "tributary" (*Zimmi*), used by the jurists, and of the rule worded thus :—"A *wakf* in favour of a non-Moslem living in a hostile country is invalid."

(*b*) Men and women.

(*c*) Majors and minors.

(*d*) Heirs or non-heirs.

(*e*) Strangers.

(*f*) Works of beneficence and charity, for example, a cemetery, a caravanserai, the tomb of a saint, the sacred cities of Mecca and Medîna.[1]

(*g*) The poor, the sick, the maimed, &c.

The settlor's powers.

The settlor has, therefore, the right to point out the beneficiaries, to take them either from his family or without. But is the right absolute? Does it go so far as to enable the *wâkif* to exclude the constituent's daughters? The words of Khalîl ibn Ishâk on this point are precise—"a *wakf* in favour of sons to the exclusion of daughters is illegal," and this rule has constantly been enforced by the Courts of Justice in Algeria. "Whereas," says a decree made on the 30th December 1864 by the Court of Algiers, "the Koran is the foundation of the religious dogmas and of the civil law of the Mussulmans; and whereas its precepts determine specially the order and manner of succession in families (Sura IX); and whereas the distribution of property such as it is ordained gives to the children of the female sex a quotient of the inheritance of which the female line shall not be deprived in favour of the male

[1] Comp. the provisions of the Hanafi Law, *ante*, p. 219, and Agnew on Trusts, pp. 349-353.

descendants unless the wish of the legislator be misunderstood; consequently, a *wakf* so constituted would be tainted by a radical illegality as made in disregard to the commandments of the Prophet, the *wakf* in question must therefore be annulled."

"Considering," says another decree of the 3rd November 1868, "that the *wakf* was made according to the Mâliki school; that according to this school female children cannot be excluded from the benefits of a *wakf*, the deed is null and void."[1] "As for sons," according to Sidi Khalîl, "the grantor may validly exclude them from the *wakf*." "The inverse (the exclusion of sons)," says Perron, "is legal, but the Courts do not feel justified in acting upon the authorities upon whose opinion this view is based, and have extended the principle laid down by Sidi Khalîl so as to place the sons on the same footing as daughters, and have declared that neither should be excluded from receiving the benefits of the *wakf*." One of the decrees of the Algerian Court of the 20th March 1865 says:—"that in virtue of a verse in Chap. IV of the Koran, the son has the right to a determinate share in the paternal heritage and cannot be excluded therefrom directly or indirectly, that a *wakf* made by the father in favour of his daughter excluding the son should be regarded as being in reality but a disguised donation having for its object the contradiction of the Mussulman Law, that from these reasons such *wakf* must be set aside."[2]

In any case, exclusion is only forbidden as regards children of the first degree. Sidi Khalîl pronounces only those *wakfs* illegal that are made in favour of sons to the exclusion of daughters. Consequently the Courts have sanctioned the exclusion of—

(*a*) A grandson.

(*b*) The female issue of daughters.

(*c*) All the issue of daughters.

(*d*) The daughters of sons.

The grantor may designate not only the first beneficiaries of the *wakf* but also the successive ones in the order in which each should come. He, therefore, has the power of giving a special right of succession different from that appointed in the *Sharaa* (the Law).

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[1] According to the Hanafi Law, it is sinful but not illegal.

[2] These decisions are founded exclusively on the Mâliki doctrines and have no application to the Hanafis

Rules relating to the devolution of family *wakfs*.

The *wâkif* may declare 1*stly*, that the right of representation should be admitted ; 2*ndly*, that devolution should take place *per capita* ; 3*rdly*, that the division should be made among the beneficiaries according to sex. But if the deed constituting the *wakf* contains no clause on these different points the following rules will be observed :—

As regards representation there is no difficulty ; representation does not exist in Mahommedan Law, there is, therefore, no reason to apply it in matters appertaining to *wakfs* any more than in matters of succession.

Regarding the second point, that is a devolution *per capita*, an explanation is necessary. With reference to the devolution in the first degree, that is, children of the grantor it must necessarily go *per capita*. If, on the other hand, the question is of devolution in the second degree or a degree further off, it takes place *per stirpes*, following the rule laid down by the jurist Ibn Rushd and carried out by al-Lakhim, al-Hattab and others. The son inherits from his father and is not excluded by his uncles, because every child succeeds and continues the branch of his father.

The Algerian Courts have given effect to this doctrine repeatedly. One of the decrees, that of the 20th April 1874, was pronounced under the following circumstances :—a *wakf* had, by a series of successive devolutions, fallen to two brothers Mohammed and al-Hadj Ali. Mohammed died in 1869, leaving seven children and the Kâẓi of Algiers decided upon the difficulties that arose about the possession of the *wakf* property by a judgment of the 20th October 1873 (confirmed on the 20th April following), that the children of Mohammed should divide among themselves as representing one branch the half of their father's share, and that al-Hadj Ali as the head of another branch should hold the other half of the *wakf*.

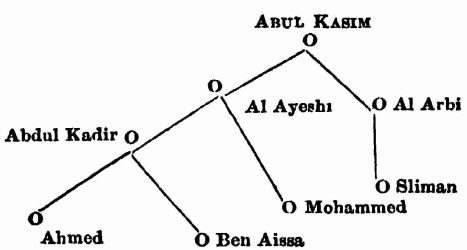
The third point relating to distribution among the beneficiaries is expounded in clear terms by Khalîl ibn Ishâk, " If the grantor has not fixed the proportions, men and women would have equal shares."

The founder can stipulate further that the privilege of a double line should be maintained, but in default of an express clause the consanguine share equally with the relations of the full blood. " The full brother and consanguine brother," says the Shaikh

al-Hattab, "have equal rights, as their relation in respect to the father is equal in degree and in legal force." "If the founder," says Sidi Khalîl, "has stipulated that the portion devolving upon such an one should fall to his nearest relative, and if this person has full brothers, consanguine and unterine, which of these would have the right to the benefit of the *wakf*; would the full brothers be preferred to the other brothers? No; because they are all equally distant; there are the same number of degrees between them all." The commentator Abdul Bâki lays down the same doctrine. "By the words 'the nearest relative,' it is understood that the full brother and the consanguine brother have equal rights, as their relationship to their father is equal."

The lower line in the same branch, *i.e.*, which is a degree further off, participates with the upper line, that which is nearer, where it is provided by the terms of the *wakf*; if not, it is excluded by the superior line.

In order better to understand this rule we subjoin the following genealogical table—



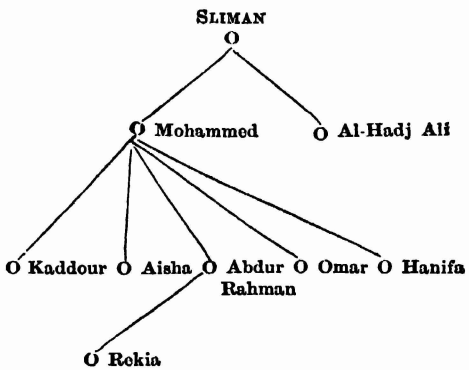
Abul Kasim, the founder of the *wakf*, had two sons al-Arbi and al-Ayeshi who became entitled in equal moities to the produce thereof. Upon al-Arbi's death, the profits of the *wakf* were divided into two shares, *viz.*, al-Ayeshi retained his half, and Sliman succeeded to the half of his father's share. Al-Ayeshi had two sons, Abdul Kadir and Mohammed. Abdul Kadir died in the lifetime of his father, leaving him surviving Ahmed and Aissa.

Q. Who should take the half of the *wakf* which had devolved upon al-Ayeshi?

A. If the *wakfnamah* does not contain any special condition, Mohammed would take exclusively, because Ahmed and Ben Aissa,

his nephews, are a degree more distant than he, and because they do not represent their predeceased father. Had the *wâkif* made a provision to the effect that all the degrees should take equally, the inferior together with the superior, Ahmed, Ben Aissa and Mohammed would have become jointly entitled to the share of al-Ayeshi and would have each taken one-sixth share of the produce of the *wakf*. This is in accordance with a decision of the Court of Algiers passed on the 25th May 1874.

Take another case :



Sliman makes a *wakf* in favour of all his children without distinction of sex ; in default of descendants, in favour of his brothers Mohammed and al-Hadj Ali and their issue, similarly, without distinction of sex. Sliman died without issue, and the *wakf* consequently devolved on his two brothers. Mohammed died leaving five children ; they divided equally among themselves the half of that which their father had held. Abdur Rahman then died, leaving his only daughter Rekia, who takes the whole of her father's share contrary to that which happens upon ordinary succession. Then al-Hadj Ali dies without issue.

Q. Upon whom would devolve *his* half of the *wakf* ?

A. Kaddur, Aisha, Omar and Hanifa each take one-quarter. As for Rekia, she is not entitled to a share in Ali's portion, as she is a degree more remote from him than her uncles and aunts, and representation not being stipulated for, she cannot claim the rights of her father predeceased. This is the solution given by the Court of Algiers on the 20th April 1874.

Where one of the beneficiaries dies without issue, his share devolves, as in the last example, upon his nearest relatives. Sometimes the founder declares this formally. "The one of the two who dies first shall transmit his share to the other." But more often the deed is silent on this point, and the Courts interpret this silence as though the clause above quoted were inserted. Thus a man named Ahmed ben Abd-ul-Kadir made a *wakf* in favour of his children; one of these dying without issue, his portion was allotted to his four brothers and sisters, each taking a fourth share in accordance with the decision of the *Majlis* of Médéa of the 3rd September 1858. Thus again, a *wakf* was held by several beneficiaries; one of these dying, a contest arose among the survivors and the Court of Algiers, by a decree of the 12th September 1867, decided that his share should be divided into equal portions among those who were of the same degree of relationship with him. This decision has since been sanctioned by a judgment of the Kâzi of the 15th circle on the 10th September and by a decree of the Court of the 25th July 1871. Such a solution admits of no difficulty when the beneficiaries are all descended in a direct or a collateral line from the founder of the *wakf*, because they are all united by ties of relationship, and are all heirs of one another; but what should be the principle for decision in those cases where the beneficiaries nominated by the founder do not belong to the same family and one of them dies without issue? Would his share fall to his co-beneficiaries? If the deed contains a clause like the one we have quoted in the *wakfnamah* of 1874, or any other stipulation from which one might surmise that it was the founder's wish to leave the *wakf* to the survivor, the question would be answered in the affirmative; this is clearly deducible from the principle laid down by Khalîl ibn Ishâk. "A *wakf* granted to ten people for enjoyment during their lives reverts, after all are deceased, to the grantor or in his default to his heirs."

In the absence, however, of any condition to that effect in the *wakfnamah*, the co-beneficiary has no claim, and the deceased's share would fall to the succeeding beneficiary, or would revert to the donor if the succession is not indicated, as exemplified in the following passage in the text:—"when a *wakf* is made in favour of two particular persons, and after them in favour of the poor, these would be placed after the decease of one of the two in possession of his share."

Section II.

What may be Constituted Wakf.

The subject of wakf.

Khalîl ibn Ishâk has laid down, that all property over which dominion can be lawfully exercised may legitimately be constituted into *wakf*. And the jurists have gone so far as to declare that the benefit accruing from draught-cattle or horses, and the services of slaves to nurse the sick, may lawfully be dedicated Whether simple aliment can be made *wakf* depends on the answer to the general question whether movable property can be lawfully dedicated. And it must be admitted that there is considerable divergence among the jurists on this point. But it seems generally agreed, however, that movable property can be made *wakf* as well as immovable property, and Perron has declared that this is in accordance with the spirit of the Mâliki school. A decree of the Court of Algiers has confirmed the above principle. Khalîl ibn Ishâk has declared that the *wakf* of a book for a library or a war-horse or a suit of armour is lawful. But in consideration of the primary object of a *wakf* and of the fact that when an appropriation is made, the intention of the *wâkif* is to reserve the property for pious acts, the usufruct being only given to the beneficiaries, the lawyers have held that those things which are liable to be destroyed by use or likely to perish in the course of time, could not be constituted into *wakf*.

Wakf of movable valid.

But a *wakf* may be made of every kind of moveable object, when they are to be sold and the price realised therefrom is to be invested in the acquisition of immovable property. Agricultural implements, yoke-oxen and other animals kept on land for agricultural purposes may be made *wakf* without any question.

Wakf of *mushâa* valid.

A fractional share of a particular property may lawfully be dedicated. And when a house has been made *wakf*, and a portion of it has been sold to pay his debts, the remaining portion will continue subject to the dedication. It is not necessary that the grantor should be in actual possession at the time of making the *wakf*. The law authorises the dedication of future property. This principle has been confirmed by a decree of the Kâzi of Algiers made in 1873 and again in 1874. The latter is worded thus: "A dedication in the name of the Almighty constituting as *wakf* the whole of which a man is possessed, and that which may accrue to him

in the future is lawful, but it will take effect with reference to such properties of which the beneficiary obtained full possession before the death of the grantor."

Formalities relative to the creating of a *wakf*.

"A *wakf* is made," says Sidi Khalîl, "by the use of the following expressions: 'I make a *wakf*,' or 'I give in alms;' but these formulæ must be emphasised by indicating the object of the dedication."

In spite of its importance the constitution of a *wakf* is not subject to any solemnity nor publicity. It is validly made by a declaration before witnesses. But the validity of a *wakf* is subject to two essential conditions, namely, (1) that it should bear the character of a pious act; (2) that there should be a transfer of the subject-matter of the *wakf*, and the proprietory rights of the appropriator should be divested therefrom. The first of these conditions is the result of the constitution of the *wakf* generally. And, consequently, when a *wakf* is made in favour of private individuals, the ultimate dedication is always reserved for such objects as the holy cities, a mosque, a caravanserai, a cemetery, a sanctuary, the poor, &c.

The validity of a *wakf* not dependent upon a charitable purpose.

It is endorsed by a clause generally worded thus:—"And after the total extinction of the appointed beneficiaries the *wakf* should go to so-and-so." We may add that a pious act may be independent of the idea of charity. Sidi Khalîl expressly mentions this and Perron explains that the *wakf* would be valid and the act pious, even though the beneficiaries were in the most affluent circumstances.

The second condition is imperatively laid down by the text. "The constitution of a *wakf* in favour of a beneficiary who has attained his majority and even that in favour of a *non compos* is null, if the beneficiary or some one on his behalf is not placed in possession." "The taking of possession," says Mohammed Assem, "is the soul of the *wakf*, and if the grantor continues to overlook and administer of the *wakf* property *and to dispose of it*, this in itself renders the *wakf* null; the law cannot legalise it." What is required, however, is not actual delivery of possession but transmutation of possession, and a change in the character of the dominion exercised over the property dedicated. The *wâkif* may lawfully constitute himself the trustee.

When delivery of seisin is made the beneficiary's possession should be either by himself, if adult, or by his father or guardian, if

an infant. In the case of a *wakf* for a pious or religious purpose, possession should be taken by its administrator. Transmutation of possession is dispensed with only in case of a *wakf* made by a father in favour of his minor son, provided the circumstances sufficiently show that there was a *bonâ fide* intention to make a *wakf*, *e.g.* (*a*) that the produce of the *wakf* had been applied to the benefit of the *cestui qui trust*; (*b*) that the father did not himself continue to derive benefit therefrom.

When possession should be taken.

The taking of possession is therefore a necessary formality, but at what period should it take place? "The law does not dictate that this formality should immediately follow the deed of constitution; it only requires it to be accomplished while the constituent fulfils the necessary qualifications for establishing a *wakf*; that is, possesses the disposing capacity and is able to exercise the right of property over it." "The *wakf* is null," says Khalîl Ibn Ishâk, "when it has not been taken possession of before the death of the grantor, or before the illness to which he succumbed." The *wâkif* has the power of subjecting the *wakf* to certain conditions, and these conditions must be strictly observed. He may determine the rite according to which it should be managed; appoint the person or persons to undertake the administration, settle the order of successive devolution, declare that the beneficiary in case of poverty should have the right to alienate the *wakf*; prescribe that in certain cases the *wakf* should revert to his heirs, etc., etc.; and, in general, order all measures relating to the execution of the *wakf*; but *there* his power ends, and any conditions contrary to the principle of *wakf* and by which a power is reserved to alter the provisions of the *wakf* or to annul the settlement, or to sell the immovable property, in fact any condition which would have the effect of destroying the *wakf*, is null and void.

According to Khalîl Ibn Ishâk, perpetuity is not an essential condition of *wakf*; and his two commentators, al-Karkhi and Abdul Baki, explain further that temporary *wakfs*, those made for even a single year or for the lifetime of any given person, are lawful and valid, and that the produce of the *wakf* thus constituted where no beneficiary is indicated, after the expiration of the period for which the trust is created, will go to the poor.

Temporary *wakf* lawful.

Can the *wâkif* annul the *wakf* of his own motion solely? Can he modify the prescribed clauses before the possession of the

beneficiary? The jurists, among them Ibn-ul-Hajeb and Abdus-Salam have answered these questions in the negative. The constitution, such as it has been made, must remain intact and be carried into effect without any modification. And if the clauses of the *wakfnamah* are obscure, incomplete, or susceptible of diverse interpretations, the difficulty would be taken before the Kâzi, who must pronounce according to the custom and usage of the place or according to the mode in which it has been hitherto carried into effect, if it has existed for some duration.

Section III.

The Legal Effect of a Wakf.

The legal effect of a *wakf*.

The constitution of property into *wakf* produces three different effects: It renders the property constituted as *wakf*, inalienable, imprescriptible and non-heritable. *Wakf* property is inalienable, because it belongs virtually to Almighty God, being intended for the benefit of mankind, the successive beneficiaries being entitled only to the usufruct thereof and not having the power to alienate it.

There are, however, several exceptions to this principle. If the *wakf* is of land or of movable property that can no longer be useful, it should be sold and others bought with the price thereof. If a mosque has to be enlarged, and if the sale of a piece of land attached thereto is the only mode by which funds can be forthcoming therefor, such sale would be permitted. If a beneficiary be poor and the produce of the *wakf* insufficient to procure for him the means of subsistence, alienation in this case might take place with the leave of the Kâzi, should the grantor have made this the object of a special clause in the deed or even if he has not mentioned it.

If the *wâkif* was so heavily indebted at the time of creating the *wakf* that his debts exceeded his assets the creditors would be entitled to realise the debt from the property, and after their debts have been satisfied, the balance of the sale proceeds should be invested for the benefit of the *cestui qui trust*. A *wakf* may be the object of an exchange, but such exchange would only be valid upon approval of the Kâzi, after he has assured himself that the value of the two properties is equal. The exchanged property would

then become *wakf* and would be subject to the same rule as the original *wakf*, and if the *wakf* had been for a specific purpose which fails, it will be applied to some other pious object, if possible, similar in character to the original purpose; for example, a *wâkif* constitutes some property into *wakf* and grants the produce thereof for constructing a bridge or a school, and if those buildings have been constructed by the State, the produce of the property would be applied to some similar object, in default of which the *wakf* would be applied to help the poor kindred of the *wâkif*, preferentially his *asabâh* (agnates).

Kindred preferred for charity.

The inalienability of the *wakf* property ceases when the grant has been made in favour of a certain object which has ceased to exist.

Though the beneficiaries cannot dispose of *wakf* property, they have the right to enjoy it and all its fruits. They are entitled to hold possession of it either personally or by a manager or administrator.

Neither the *cestui qui trust* nor the administrator can grant a lease of the *wakf* property for a long period. According to Sidi Khalîl two years, according to others three years, is the longest term for which a lease may be given unless it is given to the next reversioner, when it may be for ten years. The lease may, however, be extended if the property needs repair. It is a principle that property held as *wakf* must be kept in good repair, and that future beneficiaries can, in order to preserve their rights, oblige the usufructor to lease the house that is falling into ruin and to apply the rent wholly to its reconstruction and repair.

(*b.*) The second effect of the constitution of *wakf* is to render the property imprescriptible, that is, it cannot be subject to the rights of the sovereign as private property.

(*c.*) The third effect resulting from the constitution of *wakf* is, that it renders the property so dedicated non-heritable, and subjects the course of descent in respect of the beneficial interest, to the succession pointed out by the *wâkif*. On this point all writers agree, "the rules of succession to *wakf* property laid down by the grantor must be strictly observed," says Sidi Khalîl, and Ibrahim Halebi adds, that "the founder is absolute master to dispose of at will the usufruct of this property."

The directions of the *wâkif* must be carried out.

CHAPTER XVI.

THE LAW OF WAKF ACCORDING TO THE SHAFEI SCHOOL.[1]

It is essential that the *wâkif* should be capable of declaring his will, and that he should have the faculty of disposition over his property, while the subject of the *wakf* must be such as can be made use of perpetually. Therefore, the subject of the dedication may not consist of aliments or odoriferous plants; but with that exception, the *wakf* of movable property is as valid as that of immovable property. The *wakf* of *mushaâ* or property held in joint tenancy is valid. But it is not valid to make a *wakf* of a trained dog. The validity of a *wakf* of buildings or plantations upon another person's ground held by the owner of the buildings or plantations under a lease is acknowledged.

A *wakf* in favour of an individual or a class is not valid, if they are not capable of taking possession constructively or actually of the *wakf* property. A *wakf*, therefore, in favour of an infant *en ventre sa mère* or a slave is not valid.

It also appears from the above principle that a *wakf* may be made in favour of a *Zimmi*, but not in favour of an apostate, nor of an unbeliever not subject to a Mussalman prince, nor *in favour of one's self*.[2] A *wakf* for an unlawful purpose, as for example, the construction of Christian churches or of synagogues is void; but a *wakf* in favour of an hospital for Christians or Jews, made as it is with a pious motive, is lawful. A *wakf* is valid equally in favour of the poor as of the rich, of the learned, of mosques or schools.

The intention of making a *wakf* must be formulated in these explicit terms, "I make a *wakf* of such a thing," or "my field

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[1] The following is from the *Minhâ-ut-Tâlibîn*.

[2] Comp. the Hanafi and Shiah Law.

shall be a *wakf* in favour of such a person." The expressions "I consecrate," or "I attribute to such charity," are also explicit. The same is the case with the expression, "I make a sacred gift of such thing," or "endow," or "it shall not be sold or given to another person." On the other hand, the expression "to give" without any further qualification cannot be considered explicit, even if the intention was to make a *wakf*, and it is only in the case of a *wakf* not in favour of one or more individuals, but in favour of a class of people or of the public that this expression accompanied by the intention is regarded as explicit. The expressions, "I consecrate such an object," or "I wish that it should remain eternally in that state," are not explicit; but the phrase "I destine such a property for the purpose of a mosque" suffices to make the spot consecrated to worship.

A *wakf* in favour of a certain and particular person is not complete without his acceptance, which acceptance must in no case take place after a previous refusal. A *wakf* made in these terms, "I constitute this my land *wakf* for the term of a year" is void, but if the words used are, "I make a *wakf* in favour of my children, or in favour of such an one and subsequently upon his issue," without adding anything else, the *wakf* remains intact even after the extinction of the family. The usufruct of the *wakf* reverts to the nearest relative of the founder when the purpose fails and the holders nominated by him have become extinct. Furthermore, our school declares null and void such *wakfs* as are made without appointing a primary holder of the usufruct capable of taking immediate possession thereof; for example, when a *wakf* is made in the following terms, "I make a *wakf* in favour of the child I may have," this is invalid for there is nobody to take possession of the *wakf*, but the failure of any of the intermediate beneficiaries does not avoid the *wakf*.

The law does not acknowledge a *wakf* that has no object, nor can it be made dependent upon a contingency which may never occur. As for example, "I make a *wakf* on condition that Zaid should come." While a conditional option is also invalid. The other conditions that may be added must be executed faithfully, as for example, the condition that the endowed lands cannot be let out, or that a mosque founded be specially dedicated to a certain rite, such as the Shâfeï. In this latter case, the members of this sect

alone shall be entitled to share in the benefit of the *wakf*. And this rule applies equally to the founding of a school or of a hostelry. In the case of an endowment in favour of two persons and subsequently in favour of the poor, at the death of one of them his portion of the usufruct reverts to the other and not to the poor,[1] who only profit thereby after the death of both. This doctrine has been supported by Shâfeï himself.

Wakf in favour of children and descendants.

When a *wakf* is constituted in the following terms, *viz.*, "the *wakf* is for my children and my grandchildren," the usufruct must be equally divided among the children and the grandchildren that exist at the time of the *wakf*, even if the words "who are their descendants" or "generation after generation" is added.[2] When, on the other hand, the following terms have been used "in favour of my children, then of my grandchildren, then of my great-grandchildren, the ones after the others," or "the former first," the successive generations have the enjoyment of the usufruct and the first class takes first. The grandchildren, moreover, have no right to a *wakf* made only in favour of children. While on the other hand, the grandchildren born of the daughter of the founder are understood in the expressions "posterity," "descent," "progeny," or "grandchildren" unless it has been declared, "the grandchildren that bear my name." "A *wakf* made in favour of persons between whom and me there are ties of patronage," must be divided into two equal portions if the founder is a client as well as a patron, but according to some jurists it is null. An apposition preceding several words joined together refers to all, as for example in this sentence, "I make a *wakf* in favour of those who are dear to me, my children, my grandchildren and my brothers," it is the children, grandchildren and brothers that are accounted "dear" by the founder. The same is the case with an apposition that follows and of the reservation added to the principal clauses, provided that these words are united by the conjunction "and." For example, "I make an endowment in favour of my children and of my grandchildren and of my brothers who are dear to me" or "provided there are no persons of notoriously bad conduct among them."

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[1] Comp the Hanafi Law, *ante*, p. 290. [2] Comp *ante*, pp 265-267.

The proprietorship of *wakf* property is transferred to God, that is to say, that such object ceases for ever to be subject to the right of private proprietorship and that thenceforth it belongs neither to the founder nor to him in whose favour the *wakf* was made. Only the usufruct of the *wakf* is his, and he may have the enjoyment thereof either in person or by the intermediation of another, for example, by lending him the endowed object or letting it to him. The holder of a usufruct has the full right to the rent and of that which the endowed property produces, such as fruit, wool and milk, and the young of the animals, though another theory maintains that the divers offspring also become *wakf* by virtue of the right of accession. After the death of a *wakf* animal, the skin belongs to the holder of the usufruct. On the other hand, according to our school, the indemnity due from the murderer of a *wakf* slave does not belong to the holder of the usufruct, but he must use that money in purchasing another slave who then becomes *wakf* in lieu of the murdered slave, or in case this be impossible, he must use that money to purchase an undivided portion of a slave to replace that one.

The endowment of a tree does not, according to our school, become extinct when the tree dies, as the decay of a tree does not preclude the use of the wood, though, according to others, the tree must then be sold by auction and the price used in the same manner as the indemnity for the murdered slave. The worn-out mats and the broken beams of a mosque may be sold, and this is only lawful on condition that these articles should serve as fuel. The ground on which a mosque stands may, in no case, be sold even if the edifice have fallen to ruin and its reconstruction be impossible.

The rules relating to *tawliat*.

When the founder has reserved for himself the administration of the *wakf*, or if he has conferred the office upon a third person, the arrangement must be carrried into effect; but if nothing of this kind has been stipulated by the grantor, "our school" prescribes that the administration should be entrusted to the Judge. It is essential that the administrator of a *wakf* be of irreproachable character and qualified for the office both by his physical powers and intellectual faculties. The functions of the administrator are the custody and consolidation of the *wakf* property and the collecting and distributing of the revenues, but he is forbidden to over-

step the limits of his power, if the administration has only partly been given to him. In every case, the founder has the right of deposing his administrator and of appointing another, unless he be nominated administrator in the deed of endowment itself. A lease contracted by an administrator remains the same notwithstanding a rise in price or of a more advantageous offer.

CHAPTER XVII.

RULES OF PROCEDURE.

As regards the right of a beneficiary to obtain a declaration that a certain property is *wakf* property, or to establish his title to a share in the proceeds of a certain *wakf*, the Mahommedan Law is very distinct. It provides that any beneficiary can at any time proceed before the Kâzi and obtain any redress to which he may be legally entitled. The law imposes no restriction as to the manner in which he should proceed. The Indian Legislature, however, has, with respect to a certain class of cases, provided certain rules which require consideration, especially as the Calcutta and Allahabad High Courts are not in accord with each other in regard to the procedure.

In Mahommedan countries, endowments which are in their nature public, or the benefits of which are for the public generally, are under the direction, control and supervision of a special officer appointed by the Government, who is called the *Nâzir-i-Awkâf*. But the Kâzi, as the representative of the sovereign, is the general curator of all *wakfs*, whether public or private. When the British first assumed the government of these Provinces under the authority of the Mogul Emperor, they found numerous endowments, chiefly created by the sovereigns and chieftains, scattered throughout the country. For a time matters were allowed to remain in the condition of disorder in which the collapse of the Mahommedan Government had left the endowments. But in 1810 it was found necessary to pass a law for the purpose of protecting and preserving these dedications and grants. With that object Regulation XIX of 1810 was passed. Its object is sufficiently clear from the preamble.[1]

In 1863, however, it was considered desirable on the part of Government to divest itself of all connection with the religious

[1] "Whereas considerable endowments have been granted in land by the preceding Governments of this country, and by individuals for the support of

endowments of Hindus and Mahommedans, and to retain the control only of such institutions as were secular in their character. It was supposed that the connection of a Christian Government with the religious establishments of Hindus and Mahommedans was anomalous and inexpedient. To give effect to this mistaken, but intelligible, policy, Act XX of 1863 was passed.[1]

The preamble and the earlier sections of this Act indicate conclusively its scope, and there can hardly be any doubt that its

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mosques, Hindoo temples, colleges and for other pious and beneficial purposes, and whereas there are grounds to suppose that the produce of such lands is in many instances appropriated contrary to the intentions of the donors to the personal use of the individuals in immediate charge and possession of such endowments and whereas it is an important duty of every Government to provide that all, such endowments be applied according to the real intent and will of the grantor, and whereas it is moreover essential to provide for the maintenance and repair of bridges, serais, kuttaras and other buildings which have been erected either at the expense of Government or of individuals for the use and convenience of the public, and also to establish proper rules for the custody and disposal of nuzzool property or escheats, the following rules have been enacted to be in force from the period of their promulgation throughout the provinces immediately dependant on the Presidency of Fort William.

"The general superintendence of all lands granted for the support of mosques, Hindoo temples, colleges and for other pious and beneficial purposes, and of all public buildings, such as bridges, serais, kuttara and other edifices, is hereby vested in the Board of Revenue and Board of Commissioners in the several districts subject to the control of those Boards respectively."

[1] "Whereas it is expedient to relieve the Boards of Revenue and the Local Agents in the Presidency of Fort William in Bengal and the Presidency of Fort St. George from the duties imposed on them by Regulation XIX of 1810 of the Bengal Code, so far as those duties embrace the superintendence of lands granted for the support of mosques or Hindoo temples and for other religious uses, the appropriation of endowments made for the maintenance of such religious establishments, the repair and preservation of buildings connected therewith, and the appointment of Trustees or Managers thereof, or involve any connexion with the management of such religious establishments, and whereas it is expedient for that purpose to repeal so much of Regulation XIX, 1810, of the Bengal Code and Regulation VII, 1817, of the Madras Code as relate to endowments for the support of mosques, Hindoo temples or other religious purposes, it is enacted as follows:—

1. "So much of Regulation XIX, 1810, of the Bengal Code, and so much of Regulation VII, 1817, of the Madras Code as relate to endowments for the support of mosques, Hindoo temples or other religious purposes are repealed."

Section IV furnishes the chief index to the object of the Act.

operation was confined to such trusts or endowments as were transferred to trustees under Sections 4 to 7 of the Act. And so it was expressly decided in the case of *Delroos Banoo Begum* v. *Nawab Syed Asghur Ally Khan*,[1] in which it was further held that where such transfer had taken place, parties interested in such endowments might come in and apply for leave to sue the trustee or manager thereof,[2] and no suit would be maintainable without leave previously obtained under Section 18. But where the charge of the endowments had never been transferred to trustees under the provisions of the Act, no preliminary leave was necessary. In fact, the transfer under Sections 4 to 7 was regarded as a test whether the endowment was, in its nature, public or not. If it had been taken charge of by the Board of Revenue under Regulation XIX of 1810, and subsequently transferred to trustees under Act XX of 1863, *primâ facie*, it was such as to entitle the public generally to share in its benefit. And in that case preliminary leave to sue would be necessary before a suit can be maintained. The principle laid down in *Delroos Banoo Begum* v. *Nawab Syed Asghur Ally* with reference to the nature and scope of Act XX of 1863 has been virtually overruled by the decision in *Jan Ally* v. *Ram Nauth Mundul*.[3] In this case, it has been held

Delroos Banoo Begum v. *Nawab Syed Ally Khan.*

Jan Ally v. *Ram Nauth Mundul.*

"In the case of every such mosque, temple or other religious establishment, which at the time of the passing of this Act shall be under the management of any Trustee, Manager or Superintendent, whose nomination shall not vest in nor be exercised by nor be subject to the confirmation of the Government or any public officer, the Local Government shall as soon as possible after the Act transfer to such Trustee, Manager or Superintendent all the landed or other property which at the time of the passing of this Act shall be under the superintendence or in the possession of the Board of Revenue or any local Agent and belonging to such mosque, temple or other religious establishment except such property as is hereinafter provided and the powers and responsibilities of the Board of Revenue and the local Agents in respect to such mosque, temple or other religious establishment and to all land and other property so transferred except as regards acts done and liabilities incurred by the said Board of Revenue or any local Agent previous to such transfer shall cease and determine." Section V provides the procedure in cases of dispute regarding the right of succession in case of a vacancy in the office of any trustee, &c. to whom property has been transferred under Section IV, and Section VI declares the rights, powers and responsibilities of such trustees

[1] 15 Beng. L R., p. 167. [2] *Kaniz Fatima* v. *Bibi Sahebjan*, 5 W. R p 313
[3] I. L R., 8 Cal., p. 32.

in effect, that every mosque, Hindu temple, college or religious institution for the support of which land had been granted by the preceding Governments, or by individuals come within the purview of the Act, and that consequently no suit can be instituted with reference to any of these institutions without leave having been first obtained under Section 18.[1] This ruling apparently was adopted in another case decided by the Calcutta High Court.[2] In this case the plaintiff had sued to recover possession as *mutwalli* of certain parcels of land alleging that they were dedicated as *wakf*, and that the profits were applied to the feeding of wayfarers and travellers, to lighting the mosque and shrine in the evening, and to meeting the expenses of repeating prayers on the occasion of *Id* and *Bakreed*, and that the said profits were never spent for personal purposes. The plaintiff also alleged that her deceased husband had been the former *mutwalli*, that upon his death her step-son took possession of the *wakf* properties and had since given a mokurruri pottah of the dedicated lands to the second defendant. She accordingly prayed that the properties in suit may be declared to be *wakf*, and the sale and lease thereof may be set aside.

She succeeded in establishing that the four parcels of the land in suit were *wakf* and obtained a decree in respect thereof in the first Court which was upheld by the Judge. On special appeal to the High Court of Calcutta, it was urged on behalf of the defendants that the plaintiff had no sufficient interest to entitle her to sue. These contentions were accepted by the learned Judges who dismissed the plaintiff's suit on the following grounds:—

"According to the plaint in this case the trust is one partly for charitable and partly for religious purposes. So far as the trust was 'for the feeding of wayfarers and travellers', it was a trust for the benefit of a considerable portion of the public answering a particular description, and was therefore a trust for a public chari-

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[1] Section 18 runs thus:—"No suit shall be entertained under this Act without a preliminary application being first made to the Court for leave to institute such suit. The application may be made upon unstamped paper The Court on the perusal of the application shall determine whether there are sufficient *primâ facie* grounds for the institution of a suit, and if in the judgment of the Court there are such grounds, leave shall be given for its institution &c."

[2] *Lutifunnissa Bibi* v *Nazirun Bibi*, I L R. 11 Cal., p. 33.

table purpose. The object of the plaintiff's suit was to oust the *mutwalli*, get herself appointed in his place and have the properties vested in her. Section 539 of the Code applies to a suit of this nature which is really one for the administration of the trust, and such a suit can only be brought in accordance with the provisions of that section. But even supposing that the endowment in the case was neither a public charity within the meaning of Section 539 of the Civil Procedure Code, nor a religious endowment to which Act XX of 1863 is applicable, the plaintiff was not entitled to sue alone to be appointed *mutwalli* and to obtain possession of the property. The first Court holds that she was entitled to bring this suit, because she was a wife of Mokram Ali, the late *mutwalli*, but we cannot agree that this is a sufficient reason. Even if we regard her as suing as a person interested in the trust, then, on the face of the plaint, there are other persons interested, and she could only sue on behalf of all who were so interested, and in order so to sue she should have obtained the permission of the Court and otherwise complied with the provisions of Section 30 of the Civil Procedure Code, not having done so we think she had no right of action. In whatever light the suit be regarded, therefore, we think it clear that it was not properly framed and will not lie."

Zafaryab Ali v Bakhtawar Singh.

This view does not seem to be in accordance with the Mahommedan Law, as it introduces restrictions not recognized under that law. The Allahabad High Court has dissented from the views entertained by the Calcutta High Court. It has held that every Mahommedan has an inherent right to maintain a suit for the purpose of establishing a *wakf* or his own right to share in its benefits. In the case of *Zafaryab Ali* v. *Bahhtawar Singh*[1] certain Mahommedans sued for possession of a "takia" known by the name of Najuf Ali Shah, "by cancellation of an hypothecation thereof, dated the 28th May 1877, and of a decree, dated the 18th May 1880, as well as of a judicial sale, dated the 30th May 1881, by the demolition of two walls and by the ejectment of the defendants." They alleged in their plaint that the property in suit was "*wakf*" or a charitable endowment including a mosque (imâmbara) and a grave-yard in which there were many tombs, * * * * that defendant No. 1 the manager of the property and the ancestors of defendants Nos.

[1] I L R, 5 All, 197.

2, 3 and 4 hypothecated the premises to defendant No. 5 who having obtained a decree enforcing the hypothecation caused the property to be brought to sale, and it was purchased by him and defendants Nos. 6 and 7, that defendant No. 5 having obtained possession of the property erected two walls on the land thereby interfering with the purposes for which the property was originally intended, and that the plaintiffs became aware of all these proceedings on the 24th January 1882 and in consequence brought the present suit. The defendants set up as a defence to the suit that the plaintiffs were not competent to sue. The Court of First Instance held that the plaintiffs were not competent to sue, observing as follows:—

"It is a rule of daily practice that every aggrieved party is entitled to get his grievance remedied. On the same principle a certain set of the interested Mahommedans in this case have come forward to bring this suit against the defendants to get their complaint redressed by the Courts of Justice. The Mahommedan Law sanctions the course of action by the plaintiffs in this case. Every Mahommedan according to the tenets of his religion is entitled to get public charitable property protected from the hands of strangers."

On appeal, however, the Judge reversed the decision of the first Court, holding that the plaintiff had no right to sue. He also made the following observations :—

"Referring to a recent and closely analogous case decided by the Presidency Court in August last, *Jan Ali* v. *Ramnauth Mundul*,[1] I am of opinion that the plaintiffs have no right to bring the present suit which is to have the property declared *wakf* and made over to them as such They do not, however, pretend to be the trustees or to have any special interest in the alleged endowment, nor do they bring forward any deed creating it; I do not think that this brings the suit under Act XX of 1863, for they do not really mean to sue the manager for misfeasance, although they have included him in the prayer to set aside his conveyance. But even if it did, the suit is out of rule, as there was no application made to this Court or to any other for permission to sue. If it be alleged that there has been a breach of trust regarding a charitable endowment, then the leave of the Collector ought to have been obtained under Section 539, which has not been done. The plaintiffs, moreover, have not made any assertion in any part of their plaint as to any special right of suit, as to their being persons attending or having a right to attend the alleged mosque, but simply state their ground of action to have arisen when they heard of the alienation to the

[1] I. L. R., 8 Cal., p. 39.

defendants. Were this suit brought by the latter, the Courts could deal with it, but a question (such as lies at the root here) of whether a place was one of public worship, &c., would be more appropriately settled by the Municipal Commissioners of the town as it certainly would be more legal to adopt such a course. For this reason I dismiss the suit."

In second appeal, the plaintiffs contended (1) that being members of the Mahommedan community, they were legally competent to maintain the suit; (2) that they were not bound to observe the preliminary procedure enjoined by Section 539 of the Civil Procedure Code, that section having no bearing on the suit; and (3) that the Lower Appellate Court had misapprehended the scope of the suit which did not seek any of the remedies provided by that Section.

The High Court of Allahabad reversed the second Court's judgment, holding as follows :—

"The plaintiffs as Mahommedans, entitled to frequent the mosque and to use the other religious buildings connected with the endowment, can clearly maintain the present suit, and Section 539 of the Procedure Code has no application to such a case; the endowment in question being, in our opinion, a religious institution within the meaning of Section 24 of Act VI of 1871, and therefore governed by Mahommedan Law. We therefore remand the case under Section 562 of the Code of Procedure for trial on the merits."

Jawahra v. Akbur Hossein.

In the later case of *Jawahra* v. *Akbur Hossein*,[1] which was decided by a Full Bench of the same Court, the question as to the right of a Mahommedan to maintain a suit for the establishment of his right to use a mosque for purposes of devotion was discussed at considerable length.

The plaint in this case stated that in a village belonging to the plaintiff there was an "old dilapidated mosque intended for Mahommedan worship" which "was protected and looked after" by him and other Mahommedans of the village; that in consequence of the mosque and its appurtenances being *wakf*, it had been excluded from the partition of the village, and the plaintiff intended to repair the mosque; that the defendants had enclosed a part of the land and had also erected a mill on a part of it; that they had by means of certain erections of thatch and mud converted the mosque into a place for storing straw, all of which acts they had wrongfully done; that the plaintiff had remonstrated

[1] I. L. R., 7 All, p. 178.

with the defendants and asked them to remove the things, but they paid no attention to this request, and prevented the plaintiff from making repairs ; and, that these "unlawful acts of the defendants were calculated to affect the character of the said endowed property and were an insult to the religion." Upon these allegations the plaintiff claimed "a declaration of his right to repair the old dilapidated mosque ..... by removal of the defendants' interference" and the demolition of the compound, by removal of the mill, the thatches and the straw stored in the mosque. The plaint concluded with these words — "Suit brought according to the doctrines of the Mahommedan religion and on written and oral evidence." The defendants did not deny the acts imputed to them by the plaintiff. They defended the suit upon the grounds, amongst others, that the building which was the subject-matter of the suit was not a mosque but an "atta or fortress made for the purpose of shelter from robbers in former days," and that the plaintiff had no right to repair it. The Court of First Instance found that the building was a mosque and not an "atta," and held that "the plaintiff, as a Mahommedan and guardian of religious buildings, was entitled to repair the mosque." It, therefore, gave the plaintiff a decree as claimed. On appeal the defendants contended that "a claim for endowed property cannot be instituted and heard without the permission of the Advocate-General under Act XX of 1863." Upon this point the Court observed as follows :—

"The first ground of appeal must be overruled In a similar case—*Zafaryab Ali* v. *Bakhtawar Singh*[1] our own High Court have just ruled that Section 539 of the Civil Procedure Code would not apply, and that the plaintiffs as persons entitled to frequent the mosque can maintain the suit. This, however, is quite opposed to a ruling of the Calcutta High Court, *Jan Ali* v *Ram Nauth Mundul*."[2]

The decree of the Court of First Instance was accordingly affirmed.

On second appeal the defendants contended (1) that the suit was not maintainable in its present form, as no special right to sue in the plaintiff was disclosed, and (2) that as there were probably other Mahommedan residents in the village, the suit was not maintainable without compliance with the provisions of Section 30 of the Civil Procedure Code.

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[1] I L, 5 All, p 497

[2] I L, 8 Cal, p 39

Upon these facts and contentions, Chief Justice Petheram delivered the following judgment :[1]—

"I have no doubt that the plaintiff was competent to maintain this action. The question has arisen in consequence of the peculiar way in which property of this kind is held. According to Mahommedan custom, the property in a mosque and in the land connected with it is vested in no one. It is not the subject of human ownership, but all the members of the Mahommedan community are entitled to use it for purposes of devotion whenever the mosque is open. Now, the Mahommedans are only a part of the population of this country, so that the right is not vested in the general public, and therefore it resembles a right in a private way. Every one who has such a right is entitled to exercise it without hindrance, and has a right of action against any one who interferes with its exercise. It is not a joint right, it is a right which belongs to many people. Section 30 was meant to apply to a case in which many persons are jointly interested in obtaining relief; and where under the old law it would have been necessary for all of such persons to be joined, Section 30 prevents the record from being unnecessarily encumbered by many names, and allows one or more with the permission of the Court to sue or defend on behalf of all. The rule was introduced in order to prevent rich persons from joining together and putting forward a pauper to conduct the suit and thus escaping all costs. In the present case it is clear that an individual right has been violated, and that an action will therefore lie." Mr. Justice Mahmud's remarks are also well-worthy of consideration :—

"I wish to add a few observations regarding the Mahommedan Law as to endowments generally, and in particular as to mosques. It must, in the first place, be shown that the Mahommedan people have a right to maintain a suit like the present. But authorities on such a point need not be cited, for the principle is too well-known among Mahommedan lawyers. The rule of the Mahommedan Law on the subject is, that when any one has resolved to devote his property to religious purposes, as soon as his mind is made up and his intention declared by some specific act, such as

[1] The importance of this judgment is so great that I have been impelled to give it *in extenso*.

delivery, &c., an endowment is immediately constituted ; his act deprives him of all ownership in the property, and to use the technical language of Mahommedan lawyers, vests it in God in such a manner as subjects it to the rules of divine property whence the appropriator's right in it is extinguished, and it becomes a property of God by the advantage of it resulting to His creatures."

"A mosque is an endowment of this kind, and the Mahommedan community or any member of it has a right to enter the mosque and to pray there. The learned Chief Justice has shown that, under the circumstances, in India a mosque cannot be regarded as vested in the public at large, but in the Mahommedan part of the public, and it cannot be said that any Mahommedan is bound to maintain a suit on behalf of the public generally. The right of a Mahommedan to use a mosque is, as the learned Chief Justice has said, like the right to use a private road ; any one who has the right may maintain a suit in respect of it. This settles the question as to Section 30 of the Civil Procedure Code. That Section applies only to cases where no individual right is interfered with, but here we have the case of a mosque in a small village, and one of the worshippers in that mosque is obstructed in his use of it for purposes of devotion. He had a private right and it was violated. In regard to Section 539 of the Civil Procedure Code, I was one of the Bench who made this reference, and I wish to add my reasons for holding that the Section does not apply to the present case. There is here no question of trust or trustee or of malversation of trust-funds or other breach of trust. The object of such a suit as this, is not such as is contemplated by any of the various clauses of Section 539. In conclusion, I have a few words to say regarding the case which has been cited, *Jan Ali* v. *Ramnauth Mundul*,[1] decided in the Calcutta High Court by Prinsep and Field, JJ. Towards the end of the judgment in that case, the following observations occur : 'Now so far as regards these prayers we think that the plaintiffs were not authorised to institute this suit merely by reason of having that interest which is set out in para. 10 in the plaint, that is an interest created by there being followers of the Moslem religion living in the vicinity of the mosque and being in the habit of attending the musjid. That interest is common to

[1] I L. R 8, Cal., p. 39.

them with a large number of other persons—common to them with, we will not say all the Mahommedan population of the country, but certainly with all the Mahommedan residents in the vicinity, and we think that this is a case which falls within the provisions of Section 30 of the Civil Procedure Code. That Section enacts that 'where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court, sue or be sued or may defend in such suit on behalf of all parties so interested.' It may be quite possible that if these plaintiffs had applied to the Court under the provisions of Section 30, they would have obtained permission to institute this suit, but not having obtained that permission, they certainly were not entitled to institute the suit; and under the circumstances we think that the ground of objection taken by the defendants in the second paragraph of their written statement and which forms the subject of the second issue was a good objection, and that this suit was properly dismissed by the District Judge.' Now, with all due deference to the learned Judges who delivered that judgment, I dissent from the remarks which I have just read. I hold that it is an undoubted principle of Mahommedan Law that the persons who have the most direct interest in a mosque are the worshippers who are entitled and accustomed to use it. It is impossible to imagine whose interest in the mosque can be direct if theirs is not, and I should say that even if this case fall under the purview of Section 539 they would have *locus standi* to maintain the suit. But for the reasons which I have already given I am of opinion that neither Section 30 nor Section 539 of the Civil Procedure Code applies to the present case, and that the plaintiff was competent to maintain the suit."

The judgment of the Allahabad High Court seems to be in conformity with the provisions of the Mahommedan Law. As has been already pointed out from the *Radd-ul-Muhtâr* and the *Fatâwa Kâzi Khân*, every Mahommedan who derives any benefit from an admitted *wakf* is entitled to maintain an action against the *mutwalli*, to establish his right thereto, or against a trespasser to recover any portion of the *wakf* property which has been misappropriated, without joining any other person who may participate with him in the benefit. Unless, therefore, an endowment has been dealt with under Reg. XIX of 1810 and Act XX of

1863, and has come into the possession of trustees under this later Act, no leave seems necessary. Again, Section 539 of Act XIV of 1882 (the Civil Procedure Code), refers exclusively to "trusts created for public charitable or religious purposes."

To make the provisions of this section applicable to a *wakf*, it must appear that the trust is for a public charitable or religious purpose,—in other words, that it is vested in the public, or that the beneficiaries are selected from the general body of the public.

What are public trusts under the Mahommedan Law.

A Mussulman mosque, (unless it is a *masjid-i-jâmaa*,) a private Imâmbara, *wakfs* created for the disbursement of private charity (such as appeared to be in the case of *Lutifunnissa Bibi* v. *Nazirun Bibi*,) or for the benefit of a more or less restricted body of people is not regarded by the Mahommedan lawyers to be vested in the public or that the public have any interest in them. The Mahommedan Law makes a broad distinction between *wakfs* which are public in their nature and which are private. The *wakfs* in which the public have any interest and which, may perhaps, come within the scope of Section 539 are the *mâsalih-i-aâmma*, *e.g.*, public or *jâmaa-masjids*, bridges over which the entire body of the public have a right of way, caravanserais where anybody and everybody can alight ; public hospitals ; public cemeteries ; public libraries ; public Madrassahs and public Imâmbaras, like the Imâmbara of Mohammed Mohsin at Hooghly.

With reference to such *wakfs* as are private or only *quasi*-public, the provisions of Section 539 are in no way applicable. And if they were not taken charge of under Reg. XIX of 1810, and were not transferred to trustees under Act XX of 1863, the provisions this Act would not apply.

In respects of such *wakfs*, therefore, it is submitted the right to bring a suit would be regulated by the general provisions of the of Mahommedan Law.

It has already been remarked that where the nature of the *wakf* is undisputed, or where the fact of the property being trust-property is admitted and there are several trustees, one or more of them can bring a suit in respect of the trust-estate without joining the others. If there is no trustee or none willing to act, any one of the beneficiaries or some of them can sue on behalf of the others without leave of the Kâzi. If there is any dispute regarding the *wakf*, some of the trustees, and in their absence, some of the bene-

ficiaries can sue on behalf of the others with the permission of the Kâzi. A suit to recover property alleged to be *wakf* belongs not to the heirs or descendants of the settlor but to the *mutwallis* jointly.[1] But a person who has been convicted of having misappropriated *wakf* property cannot obtain the assistance of the Court to recover the property in order to enable him to exercise the office of *mutwalli*.[2]

The beneficiaries of a *wakf* or some of them are entitled to maintain a suit to restrain the *mutwalli* from wasting the trust-estate or misapplying it.[3]

Bechu Lal v. *Oliullah.*

Regarding the procedure to be observed when there are several *mutwallis* and some of them are unwilling to join the others in bringing a suit to recover alleged trust-property, the ruling in the case of *Bechu Lal* v. *Oliullah*[4] is in point. In that case it was held that where there are several *mutwallis*, all of them, if possible, should be made plaintiffs; but if any of them refused, then they should be made defendants.

It would seem, however, from the following principles that the ruling in this case falls short of the Mahommedan Law:—

"If the appropriator do not appoint a *mutwalli* until death comes on him and then give directions to some persons (as to how he is to act after his death,) such person will become the *wasi* of his estate and effects, and will be the *mutwalli* of his *awkâf*. Hillâl has stated that the executor will be associated with the *mutwalli* in the work of the trust [in the same way] as if he also was appointed a *mutwalli* therefor, as is stated in the *Muhît*. And if he makes one person the *mutwalli* of his *wakf* and then appoints an executor, the latter will become a partner of the *mutwalli* in the governance of the *wakf*."[5]

"If there are two *mutwallis* of a *wakf* appointed by the Kâzis of two different cities, according to the Shaikh Imâm Zâhidi, each of them will be entitled to administer the properties within the jurisdiction of the Kâzi appointing him."

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[1] *Phate Sahib Bibi* v. *Damodar Pirayi*, I L R, 3 Bom, 84.

[2] *Aga Mahommad Kamul Tehranee* v. *Aga Abbas Tehranee*, S D A, 1859, p 285

[3] *Abdur Rahman* v. *Yar Mahommad*, I L R, 3 Alla 636.

[4] I. L R, 11 Cal, 338

[5] *Alamgiri*, Vol II, pp 505, 509.

"If the *wâkif* entrusts the governance of the *wakf* to two persons, or to a *mutwalli* and a *wasi*, neither of them would be entitled singly to sell the proceeds of the *wakf*, though, according to Abû Hanîfa, each might act with the sanction of the other when the person acting would be regarded as the mandatory of the other, so it is stated in the *Hâwi*."[1]

"If two *wâkifs*, join in making one dedication and jointly appoint two *mutwallis*, both these *mutwallis*, would be like one. If they are separately appointed by two different Kâzis of two different places, they may each act as far as the property within their respective jurisdictions is concerned according to Imâm Zâhidi."[2]

"Some of the beneficiaries can sue on behalf of the others. So also some of the *mutwallis* can stand[3] as litigants on behalf of the entire body; this is like the position of a *wasi-bin-nikah* (a guardian for marriage); all these guardians, if more than one and belonging to the same class, stand on the same footing, and therefore if one of them is authorised by the others to consent on behalf of all, no outsider can raise any objection."

"When there is a *mutwalli*, a *cestui qui trust* cannot lay a claim without leave of the Kâzi for the recovery of any property which has been wasted or usurped [by an outsider], for that pertains to the *mutwalli*, but he can sue the *mutwalli* if *he* is a *ghâsib*, or to establish his title to a share in the profits of the *wakf*."

Some of the persons interested may sue on behalf of the entire body, when the property is admittedly *wakf*, even without leave of the Kâzi.

"In the *Bazazia* it is stated from the *Durrar* and *Ghurrar* that when a property is dedicated for the poor or for any purpose among the purposes of Almighty God, and it has been wrongly taken hold of by an usurper, in such a case the *mutwalli* has ordinarily the right to sue for its recovery. And if the *ghâsib* has made any erections or planted any trees, and they can be removed without any damage to the *wakf* premises, he will be allowed to do so, not otherwise. In the latter case, if his possession commenced *bonâ fide*, he would only get ordinary compensation.[4]

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[1] *Alamgiri*, Vol. II, p 506

[2] *Fatâwa Kâzi Khân*, Vol IV, pp 304-306.

[3] The word used here is (يَنْصِب) which is intransitive and means, can stand or can be constituted.

[4] *Surrat-ul-Fatâwa*, p 437

Where the *mutwalli* is himself the *ghâsib*, or has, in breach of his trust, conveyed the property to another, the beneficiaries are entitled to sue the *mutwalli* or to sue him in conjunction with his assignee to recover the property.

But even where the character of the *wakf* is in dispute, a person who alleges to be beneficially interested, jointly with others, in the *wakf* is entitled to sue for its recovery, if it is misappropriated, with the leave of the Kâzi, without any difference of opinion. If he sues without such leave, and the *wakf* is in favour of a limited number of individuals, there are two opinions regarding the question. But the more correct view is that he cannot sue for the possession of the property, because he is only entitled to an interest with other specific individuals in its income. For example, if the *wakf* is for the sons of *A* or for Zaid, Bakr, Amr and Hafsa, one of them cannot sue singly to recover an usurped property without leave of the Kâzi. The reason on which this rule seems to be founded is obvious. The other beneficiaries may not care to have the property or to launch into a speculative suit, and the Kâzi will then see whether there are *primâ facie* grounds for the institution of the suit. But a person who is the sole beneficiary may sue without such leave. Where, however, the *wakf* is in favour of, or alleged to be in favour of, a body of people, varying in number, some of them may sue without leave of the Kâzi, for the right to the benefit of the *wakf* is not vested specifically in each beneficiary, but they are all collectively and separately entitled to its benefit as a whole. For example, in the case of a mosque any person who is in the habit of praying there is entitled to its full use; his right to its user is wholly independent of the right of other Moslems; nor is there any limit to the number of people who may offer their prayers therein. Consequently, any one of the devotees may sue without leave of the Kâzi.

These distinctions were overlooked in the Calcutta cases.

When there are several people entitled to the benefit of a *wakf*, some of them may sue the others for embezzlement.

"The position of a *mutwalli* and an executor is alike. The dealing of one of two *wasis*, like the acts of one of two *mutwallis*, is void, for the two *mutwallis* and the two executors are like one in certain matters. This is the saying of the *Ashbâh* and *Kinia*. The result is, that if one of two executors, or if one of two *mutwallis* were to give an *ijâra* of the *wakf* land, it will not be valid, without

the assent of the other, though both may have been appointed separately. Some jurists have no doubt held that they can act separately. And Abû Lais has held that this is the approved doctrine, and we ought to adopt it. But the first doctrine is mentioned in the *Mabsût* as the correct one, and it has been accepted in the *Durrar* and Kahastâni has stated that it is the right view." The author of the *Radd-ul-Muhtâr* then proceeds to say, "My view is, that this is so when the two *mutwallis* or the two executors have been appointed by the *wâkif* or testator or by one Kâzi. Accordingly, the act of one will be valid when ratified by the other, and no renewal of the obligation will be necessary as is mentioned in the *Manah*. So is the position of an executor associated with a *mutwalli*. And it is mentioned in the *Hamidia* from the *Ismailia*, that if a *wasi*, without the knowledge of the *mutwalli* deals with the estates and some of it is lost, he would be liable for damages."[1]

"But the acts of one of two executors or of one or two *mutwallis* are valid in respect of the buying of shrouds for the testator or *wâkif* and his funeral, and in demanding and litigating for the debts due to his estate and for his *rights*. The doctrine of the lawfulness of one *mutwalli* or of one executor demanding by himself the dues to the estate of the deceased or bringing a suit therefor is founded upon reasons of necessity. [For example, the other executor may refuse to act, and owing to his conduct, the *wakf* property may be about to be wasted or the other *mutwalli* is absent.] So it is mentioned in the *Nikaya*, and its commentator Kahastâni implies the same. The right to litigate is supported by the *Zakhîra*. But Abû Yusuf has held that either *mutwalli* can act by himself, unless the *wâkif* has expressly provided that they must act together.[2] If one *mutwalli* refuses to act he must be taken to have renounced the trust. And the other *mutwalli* can act for the protection of the estate until the Kâzi has appointed another or authorised him to be the sole *mutwalli*."[3]

"The permission for one *mutwalli* alone to bring a suit without joining the others is founded on the reason that they cannot act

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[1] *Radd-ul-Muhtâr*, Vol. V, p. 689. [2] *Ibid*, Vol., III, p. 650,
[3] Kâzi Khân on Wills, p. 434

jointly in preferring their claim, and even should they join, only one can be allowed to plead. This is in the *Durrar*."[1]

"When a person has appointed two executors, and one of them dies appointing the other as his executor, the surviving executor can act for the original testator as a sole executor."[2]

"If one man appoints two executors, according to Abû Hanîfa and Mohammed, neither of them can act singly in dealing with the properties of the testator, and the acts and dealings of one of them are not valid without the permission of the other, except in certain matters, *viz.*, the funeral of the deceased, the payment of his debts and legacies, the emancipation of his slaves, the restoration of deposits and usurped properties. But they cannot act singly in taking possession of properties and debts restored to, or paid to his estate, *though any one of them may sue singly to recover his rights due from other people.*"[3]

"Any one of the trustees may act singly in the following matters, *viz.*, in the buying of shrouds, burying the testator, in supplying the food and raiment of his infant children, in returning the deposits with the testator, and paying off his debts and legacies, in the emancipation of his slaves, and *litigating for his rights.*" If there are co-trustees of lands, any one of them may receive the rents, though all must join in a conveyance.[4]

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[1] *Radd*, p 690. [2] Kâzi Khân, p 441 [3] *Ibid*, p. 440
[4] *Fatâwa s Sirâjia*, Jarman on Wills, II, p 432

CHAPTER XVIII.

THE LAW RELATING TO WILLS.

SECTION I.

PRELIMINARY DISCOURSE.

THE records that have been handed down to us from antiquity regarding the customs and usages of the pre-Islâmite Arabs seem to establish abundantly that testamentary dispositions were not unknown among the pagan tribes of the peninsula. But it is difficult to say, from the materials in our possession, what were the conditions which regulated the validity or invalidity of wills made by them.

The Rabbinical Law which was in force among the Jewish tribes prohibited the testator from depriving his lawful heirs from the succession; it also precluded him from constituting a stranger as an heir. But when a disposition was effectuated by the immediate delivery of possession, the Rabbinical Law apparently regarded it as valid. A will could be made either verbally or in writing but, generally speaking, the first mode was considered as the more preferable of the two.

The Koran expressly sanctioned the power[1] of making a testamentary disposition, and regulated the formalities and conditions to which it is subjected.

"Wills," says the *Hedâya* "are lawful on a favourable construction. *Analogy* would suggest that they are unlawful, because a bequest signifies an endowment with a thing in a way which occasions such endowment to be referred to a time when the property has become void in the proprietor, (*i.e.*, the testator), and as an endowment with reference to a future period (as if a person were to say to another, 'I constitute you proprietor of this

[1] Koran, Chap. V, verse 75.

article on the morrow') is unlawful, supposing even that the donor's property in the article still continues to exist at that time, it follows that the suspension of the deed to a period when the property is null and void, (as at the decease of the party,) is *a fortiori* unlawful. The reasons, however, for a more favourable construction in this particular are two-fold;—First, there is an indispensable necessity that men should have the power of making bequests, for a man, from the delusion of his hopes, is improvident and deficient in practice, but when sickness invades him, he becomes alarmed and afraid of death. At that period, therefore, he stands in need of compensating for his deficiencies by means of his property—and this in such a manner that if he should die of that illness, his objects (namely, compensation for his deficiencies and merit in a future state) may be obtained,—or, on the other hand, if he should recover that he may apply the said property to his wants — and as these objects are attainable by giving a legal validity to wills, they are therefore ordained to be lawful. Secondly, wills are declared to be lawful in the Koran and the traditions, and all (our) doctors, moreover, have concurred in this opinion."

The remarks of M. Sautayra on this subject are deserving of special consideration :—

"A will from the Mussulman's point of view is a divine institution, since its exercise is regulated by the Koran. It offers to the testator the means of correcting to a certain extent the law of succession, and of enabling some of those relatives who are excluded from inheritance to obtain a share in his goods, and of recognising the services rendered to him by a stranger, or the devotion to him in his last moments. At the same time the Prophet has declared that the power should not be exercised to the injury of the lawful heirs."

"The tradition reported by Abi Wakkâs supports the above view and forms the foundation for the restriction which the Mahommedan Law imposes on the power of testamentary disposition possessed by a Mussulman. He says that 'In the year of the conquest of Mecca, being taken so extremely ill that my life was despaired of, the Prophet of God came to pay me a visit of consolation, I told him that by the blessing of God having a greater estate but no heirs except one daughter, I wished to know if I might dispose of it all by will.' He replied: 'No.' And when I severally

interrogated him, 'if I might leave two-thirds or one-half, he also replied in the negative—but when I asked if I might leave a third', he answered, 'Yes, you may leave a third of your property by will, but a third part to be disposed of by will is a great portion, and it is better you should leave your heirs rich than in a state of poverty which might oblige them to beg of others.' "

The result of these directions is, that under the Islâmic Law, a testator cannot by a testamentary disposition deprive his lawful heirs of their share in the inheritance nor dispose of more than one-third of his estate.[1] A bequest to an heir is under no circumstance valid, though a bequest in favour of a non-heir is valid to the amount of the third of the estate of the testator, although the heirs of the testator may not give their assent thereto. These principles, however, will be developed fully in their proper place.

Having so far pointed out the basis on which the Mahommedan Law relating to wills is founded, I shall now proceed to discuss what is the definition of a will under the law of Islâm, and the conditions requisite for making a valid testamentary disposition, or giving a valid testamentary direction; in other words, the testamentary capacity of the person making a will.

SECTION II.

FORM AND CHARACTERISTICS OF A WILL OR WASIAT.

A will is defined by Jarman to be "an instrument by which a person makes a disposition of his property to take effect after his decease, and which is in its own nature ambulatory and revocable during his life."[2] Under the Mahommedan Law, however, a will may be made either verbally or in writing.[3] And consequently a *wasiat* is defined in the *Alamgiri* "to be the *conferment* of a right of property in a specific thing or in a profit or advantage in the manner of a gratuity to take effect on the death of the testator."[4]

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[1] Tirmizi; Ibn Mâja, *Radd ul Muhtâr*, Vol V, p 639

[2] Jarman on Wills, p 16.

[3] A written will is termed a *wasiatnamah*, while a nuncupative will is called simply a *wasiat* A will need not, under the Mahommedan Law, be in writing *Tumeez Begum* v *Furkhut Hussan*, 2 N W P R, P 155.

[4] Compare also *Radd-ul-Muhtâr*, Vol V, p 640

The *Sharâya* defines *wasiat* somewhat similarly, namely, as the act of conferring a right in the substance or the usufruct of a thing after death.

It may be constituted by the use of any expression that sufficiently indicates the intention of the testator; so long as it is apparent that the intention of the testator is to make a disposition operative on his death, it will be regarded as a *wasiat*. The devise may be either to the legatee beneficially or in trust for some purpose or object, and may be constituted, by saying, "I have bequeathed such a thing to such an one,"[1] or "I have bequeathed towards such an one," or by any other words or expression that convey the idea of a disposition dependant for its operation upon the death of the testator.

A will may be made also by signs, as in the case of a dumb person who does not possess the faculty of speech, but who can express his meaning by signs. So also in the case of a person who is a *mâriz*, that is, suffering from a mortal illness and unable from weakness to speak.[2] "A sick man makes a bequest, and being unable to speak from weakness, gives a nod with his head, and it is known *that he camprehends what he is about;* in these circumstances, if his meaning be understood, the bequest is lawful but not otherwise. And it is implied that he dies without regaining the power of speech; for then it is evident that there was no hope at the time of the bequest of his being able to speak, and his condition was therefore the same as that of a dumb man."[3]

In some cases the disposition may *primâ facie* appear to convey an immediate interest, and yet the intention may not be to give it operation during the lifetime of the testator; when that is so, the disposition will take effect as a *wasiat*. Mere postponement of the actual enjoyment of a property conveyed to a person does not necessarily constitute the disposition testamentary, as appeared in the case of *Nawab Amjad Ally Khan* v. *Mohamdi Begum*.[4] The character of the disposition, whether it is a will or a disposition *inter vivos*, whether it operates *in præsenti* or *in futuro* as a *wasiat*, is dependent upon the intention of the testator.

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[1] The difference between the two expressions arises from the use of the two propositions "towards" (*ilâ*) and "to" (*le*) the first signifying the conveyance of a beneficial interest to the legatee and the second by way of trust.

[2] *Radd ul-Muhtâr*, Vol V, p 636

[3] Baillie, p 652, *Alamgiri*, Vol VI, p 168. [4] 11 Moore's I A, p 517

A *wasiat* may be conditional or contingent Its operation will therefore be dependent upon the happening of the contingency, and if the contingency does not happen, it will not be given effect to.[1] A reference to some impending danger is common to most of these cases. For example, a man may say, "should I die of such a malady," or "should I not return from the pilgrimage to the Holy Shrine I leave, &c.," or "I bequeath so-and-so in case anything happen to me on my voyage to Mecca," the *wasiats* in these cases would not take effect if the contingencies apprehended do not happen, whether the will be in writing or by word. The jurisconsults, however, draw a distinction between a contingent *wasiat* in writing and one made verbally. They hold that when there is only a verbal *wasiat* dependent for its operation on the happening of a contingency which does not happen, the *wasiat* is revoked *ipso facto*. But if the wish of the testator has been reduced into writing, and that writing has been confided into the hands of a third person, and after the possibility of the contingency ever happening has ceased, if the testator does not withdraw the writing from the hands of such person, it will be presumed that he did not intend to revoke his *wasiat* made before, and effect will be given to it. If the will always remained in the hands of the testator no such presumption would arise. But when the *wasiat* is in the following terms "should I die," or "if I die, such a thing," or "so much of my inheritance shall belong to such an one," it will not be a contingent will but a *wasiat*, pure and simple, because it is the essence of a *wasiat* that it should take effect upon the death of the testator.[2]

Contingent *wasiat*.

Section III.

The Capacity of Testators.

There is considerable difference between the several schools regarding the capacity to make a will. Freedom, however, is regarded by all the schools as a necessary condition. A slave, whether in the absolute control of his master, or one[3] who has obtained a qualified freedom upon a covenant for ransom cannot make a testamentary

The capacity of testators

Freedom.

[1] And it will not be admitted to probate, 1 Jarman, p. 16, *Parsons* v *Lanoe*, 1 Ves., 190; *Sinclair* v *Home*, 6 Ves., 607

[2] Sautayra p 341.

[3] Example of this will be given later

disposition of his property. But a bequest made by a person labouring under this disability would be valid when its operation is referred to a time subsequent to his attaining his freedom.[1] A prisoner incarcerated for an offence is not subject to this disability, for he is not debarred by his loss of freedom under the direction of the law, from dealing with his property, as his conviction of the offence does not vest the property in anybody else, whereas the slave, whether absolute or qualified, can only hold property subject to the control of his master.

Sanity. Sanity also is a necessary condition to the validity of a *wasiat* "A bequest," says the *Fatâwa Alamgiri*, "by any one who is incompetent to perform a gratuitous act is null. Hence, bequest by an insane person or a *mokâtib*[2] or a *mâzoon*[3] is void. And if a person is insane at the time of making a *wasiat*, but afterwards recovers from his insanity and then dies, still the bequest is unlawful for want of competency at the time of making it."

According to the English Law, a will made during a lucid interval is valid. In other words, though the fact of a person being found insane is *primâ facie* evidence of habitual insanity, and consequently of the invalidity of the will, yet it does not preclude proof that the execution occurred during a lucid interval. The principle of the Mahommedan Law is apparently different,—for, according to Kâzi Khân, if a person makes a *wasiat* and subsequent thereto becomes a permanent lunatic, in such a case the *wasiat* will become void. But when the madness has not lasted over six months, the bequest will not be voided.

The law requires a perfectly disposing mind, and a person who becomes mad shortly after making a bequest, or who is mad at the time, is presumed not to be capable of exercising the faculty of properly considering the nature of the act. Similarly, if a person were to make a bequest, and then become subject to hallucinations and afterwards lose his mind, and remain in that condition until his death, the *wasiat* will be void.[4] It would follow from the above *dictum* that when a person is a lunatic, and makes a bequest during

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[1] A *mokâtib*

[2] A slave who has entered into an agreement with his master for his ransom or emancipation.

[3] Licensed slave—a slave who has obtained licence to work for himself.

[4] *Radd-ul-Muhtâr*, Vol V, p. 651.

a state of lucidity, the bequest would be invalid, for the reasons upon which the *wasiat* of a person who loses his mind after the bequest, is held to be void. Is perfect sanity, however, an essential condition? The *Sharâya* speaks of "perfect understanding" as necessary to the valid constitution of a will; but it would seem from the cases given in the *Jâmaa-ush-Shittât* and the general purport of the Hanafi Law, that what is required is a mind that comprehends the nature of the testamentary act, in other words, it must be a disposing mind. As long as the capacity to understand the nature of the act is present, as long as the person entering into the obligation is possessed of understanding sufficient to comprehend the effect of the disposition, the mere existence of partial delusions would not destroy the capacity to make a will.[1] As a general rule, it may be stated that the principles of the Mahommedan Law with regard to the disposing capacity of persons afflicted with any mental delusion on any particular subject, which however does not interfere with their powers of comprehension, are analogous in the main to the principles recognised by the English Law.

Absolute insanity may not be the only cause of destroying the disposing capacity. The will of an idiot is of course void. Mental imbecility arising from advanced age, illness, or any other cause may destroy the testamentary power. The loss of the disposing capacity may be either temporary or permanent. A temporary loss may be caused by drinking, drugging, illness, &c. Undue influence exercised over a weak mind may also lead to the same effect.

Under the Mahommedan Law, the acts of disposition by a person suffering from an illness which induces the apprehension of death and which eventually causes death, have only a qualified effect given to them. For example, when a person suffering from such an illness makes a gift or *wakf*, such disposition, though an act of immediate operation, takes effect like a will and is valid only so far as a *wasiat* may be valid.[2]

This is independently of any question regarding the disposing condition of the testator's mind or the spontaneity of his action. The

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[1] See the case of *Banks* v *Goodfellow*, L. R., 5 Q. B., 549.

[2] The will of a person suffering from a *Marz-ul-mout* is valid only as to a third, *Radd u'-Muhtâr*.

law presumes that a person in such a state is devoid of a complete disposing faculty. In considering, therefore, the operative character of voluntary dispositions to which effect is given immediately, regard is to be had to the state of the disposing party at the time of the contract. If he was then in health, they are valid as against the whole of his property, and if he was not then in health, they are valid as against a third of it. By acts of disposal are to be understood such acts as are initiatory or creative of right, and have in them something gratuitous. For the acknowledgment of a debt in sickness operates against the whole of a person's estate, and a marriage contracted in sickness is in like manner operative against the whole to the extent of the proper dower. An act of disposal which is not to take effect till after the death of the disposing party, as when a man says—"Thou art free after my death," or "This is to Zaid after my death," is good only to the extent of a third of his property even though it were made in health. Emancipation, *muhâbât*,[1] *wakf*, gift and *ziman* or suretyship by a sick man have all the same effect as bequests, and operate only against a third of his property.[2] The diseases which naturally give rise to an apprehension of death and which are technically called *Marz-ul-mout* or *death-illness* have been explained in a previous chapter. Some further explanations may usefully be added here.[3]

Marz ul mout (Hanafi doctrines).

"The approved doctrine as stated by Kahastâni is that *Marz-ul-mout* is an illness from which death results though the sufferer be not confined to his bed. A long-standing illness is not regarded as a death-illness so as to overpower the disposing faculty of the sufferer and restrict his capacity to make a disposition of his entire estate, on the ground that when it has existed for a long period, it has become a part of his nature as in the case of the blind, the lame, &c. A death-illness is accordingly a disease from which death is imminent, and this happens when it goes on increasing until it ends in death, but where it remains stationary for a long time, or the progress is so imperceptible as to cause no fear to the sufferer, when he becomes habituated to it, it is not

[1] *Muhâbât* is an act by which the donor makes a gratuity to the donee either by reducing the price or increasing the value of the property sold. *Muhâbât* is derived from *hubwat*.

[2] *Alamgiri*, Vol VI, p. 168, Baillie's Dig., p 651

[3] From the Chapter on Wills, *Radd-ul-Muhtâr*, Vol. V, p 639

death-illness.[1] When a death occurs after the lapse of a full twelve-month from the commencement of the disease, the disposition is valid with reference to the entire estate. But when a death has occurred before that period from a disease which usually ends fatally, and the diseased was disabled by it from leaving his house to attend to his ordinary avocations or, if a woman, from performing domestic duties in the house, such a disease is regarded as death-illness and the disposition will take effect with reference to one-third." "A gratuitous disposition by a woman about to be confined is valid with reference to one-third; so also if two bodies of men come into collision with each other which ends in bloodshed and the death of some, the rule of *Marz-ul-mout* would apply, (*i.e.*, the disposition made after the people had started for the fight would only take effect with reference to a third, but not if there was no collision). So also the disposition of a person overwhelmed in a storm and of the prisoner ordered to be executed."[2]

Shiah doctrines.

The provisions of the Shiah Law on this branch of the subject are analogous, and yet there are some features of difference which deserve especial attention. According to the *Jawâhir-ul-Kalâm*, "dispositions of property by a person suffering from a mortal illness are of two kinds:—such as are deferred and not intended to have operation until after the death of the testator; and such as take effect immediately. The first are to be treated in every respect as legacies according to the unanimous consent of 'our' doctors and like the acts of a person in health, which are done with reference to his death so as not to take effect till after it. The second description of acts are such as are of immediate operation like *muhâbât* or connivance at loss in contracts of exchange and gift, *wakf* and emancipation. These are good according to some of 'our' doctors as against the whole of the settlor's property, and according to others only as against a third. Both opinions, however, agree in this that if he should recover from his sickness, they are valid against himself and against his heirs, and the difference of opinion is only when he dies of the same disease."

"Here it is necessary to note the diseases which restrain a man from disposing of more than a third of his property. Upon this

[1] This is according to Zaiye and others.

[2] *Radd-ul Muhtâr*, Vol V, p 650, according to the *Mirâj*

point we may say that every disease which is usually accompanied with apprehension of death is said to be dangerous,[1] such as hectic fever, consumption, hæmorrhage, &c. Diseases, again, from which there is usually recovery have no other effect on a man's disposal of his property than if he were in a state of health such as temporary fever, headache, whether with continued augmentation or not, ophthalmia, and a tubercle on the tongue. Diseases, again, which admit of being classed as either, that is, as *dangerous* and *undangerous* are putrid fever, diarrhœa, a phlegmatic swelling. It were, however, better to ascribe the effect under consideration to all diseases which are in fact accompanied with, or terminate in death, whether they are customarily dangerous or not. *But occasions of actual conflict in war, or of a childbirth with women, or of storms at sea have not the effect alluded to, namely, that of impairing a person's power to dispose of his property, because, in point of fact, the term disease is quite inapplicable* to them."[2]

The effect of testamentary dispositions by a person labouring under an illness of which he eventually dies, is thus explained in the *Sharâya* :—

(*a*) When a person in sickness has made a gift and also entered into a *muhâbât* transaction, and the third of his property suffices for both purposes, there is no question that effect is to be given to both. But if it should fall short, the first act of the deceased is entitled to preference, and effect would be given to the other acts in succession until the third is exhausted when the deficiency would fall solely upon the last.

(*b*) When a gift of immediate operation and one whose effect is postponed or suspended are made at the same time, preference is to be given to the former, but effect will also be given to the latter if the third of the estate is sufficient for both purposes, but if not, the latter is valid so far as the third will bear and void as to the remainder.

(*c*) When a sick person having no more than a *kurr* (measure) of grain of some kind of the value of six dinars sells it for a *kurr* of inferior grain of the value of two dinars the loss by the *muhâbât* is a half of his whole estate, whereas all that he can lawfully dispose of is no more than a third and the purchaser should

[1] Querry, *Droit Musalmân*, I, p. 635. [2] On this point the Hanafis differ.

accordingly restore a sixth to the heirs, but that would be usurious, and in order to make a valid transaction it is necessary that he should give back to the heirs one-third of their good *kurr*, and that they should give back to him one-third of his inferior *kurr*; there will thus remain with the heirs two-thirds of the *kurr*, or two dinars in value, and with the purchaser two-thirds of a *kurr* or four dinars in value, which will only be an excess of two dinars or one-third of six (the whole estate) which is just the amount which the seller could lawfully dispose of in his last illness.

(*d*) If a sick person should sell some article of the value of two hundred for one hundred and afterwards recover of his disease, the contract is necessarily binding. But if he should die, and the heirs refuse to ratify the sale, it would be valid so far as a half of the article is opposed to what he actually paid, and that is three parts out of six and the *muhâbât* is good as to two-sixths or one-third of the six, and these together, amount to five-sixths of the article to which extent then the sale is valid, and void only as to the remaining one-sixth which therefore must be returned to the heirs. The purchaser, however, has an option and may cancel the sale on account of the partial invalidity of the bargain or abide by it, but should he adopt the latter alternative and offer the heirs a compensation for a sixth of the article, they also have an option either to reject or accept, their right being involved in the substance of the article.

The result of these provisions is, that a testamentary disposition by a person suffering from a death-illness is valid, if at the time of the *wasiat*, the testator was sufficiently in his senses, and the act was a spontaneous expression of his own wish or intention. An act of immediate operation even would take effect as a *wasiat*.

There is considerable difference, however, between a gratuitous disposition made on a death-bed or in contemplation of death, and the acknowledgment of a liability.

"It is to be observed as a general rule," says the *Hedâya*, "that where a person performs with his property any gratuitous deed of immediate operation, (that is, not restricted to his death,) if he be in health at the time, such deed is valid to the extent of all his property—or, if he be sick, it takes effect to the extent of one-third of his property, and where a person performs such deed with his property restricted to the circumstance of his decease, it takes

effect to the extent of a third of his property, whether at the time he be sick or in health. If, on the contrary, a person make an acknowledgment of debt, such acknowledgment is of effect to the whole extent of his property, notwithstanding it be made during sickness as this is not a *gratuitous* deed. Still, however, a declaration of this nature made in health precedes a declaration of the same nature made in sickness. It is also to be remarked that a sickness, of which a person afterwards recovers, is considered in law as health."

"If a sick person make an acknowledgment of debt in favour of a strange woman, or make a bequest in her favour, or bestow a gift upon her and afterwards marry her and then die, the acknowledgment is valid, but the bequest or gift is void; for the nullity of an acknowledgment in favour of an heir depends on the person having been an heir at the time of making it; whereas the nullity of a bequest in favour of an heir depends on the legatee being so at the time of the testator's death as has been already explained, and as the woman was not an heir at the time of the acknowledgment but had become so (by marriage) at the time of the testator's death, the acknowledgment is therefore valid, but the bequest is void, and so likewise the gift, it being subject to the same rule as the bequest."

"If a sick person make an acknowledgment of debt due by him to his son, or make a bequest in his favour, or bestow a gift upon him at a time when the son was a Christian, and he (the son) afterwards previous to his father's death became a Mussulman, all those deeds of acknowledgment, gift or bequest are void; the bequest and the gift, because of the son being an heir at the death of his father as above explained, and the acknowledgment, because, although the son on account of the bar (namely, difference of religion) was not an heir at the time of making it, still the cause of inheritance (namely, consanguinity) did then exist, which throws an imputation on the father as it engenders a suspicion that he may have made a false declaration in order to secure the descent of part of his fortune to his son. It is different in the case of marriage as above stated, for there the cause of inheritance, (namely, marriage) occurred posterior to the acknowledgment and had no existence previous thereto, for supposing the marriage to have existed at the period of making the acknowledgment, and that

the wife being then a Christian, should afterwards, before the husband's death, become a Moslemah, in that case it (the acknowledgment) would not be valid."

"If a sick person make an acknowledgment of debt due by him to his son who is an absolute slave or *mokatib*, or bestow a gift upon him, or make a bequest in his favour, and the son should afterwards, before the death of his father, obtain his liberty, in that case none of these deeds are valid, because of the reasons explained in the preceding example."

Similarly, Kâzi Khân declares, "When a sick man has acknowledged a debt to a woman who is a stranger to him, or bequeathed a legacy to her, or made her a gift and has subsequently married her and then died, the acknowledgment is lawful according to 'us,' but the legacy and the gift are void. And when a sick man has made a bequest to his son who is an infidel, or a slave, or has made a gift to him with delivery, or acknowledged a debt to him, and the son is then converted to the faith, or is emancipated before his death, the whole of his act is void."

But when the acknowledgment is not for a specific amount, or for a specific thing, it will be given effect to from the one-third of the estate. For example, if a person were to say to his heirs on his death-bed, "I am indebted to Zaid, and you must credit what he says," in that case the claim of Zaid to any amount not exceeding a third of the estate must be admitted, although the heirs should claim it. This proceeds upon the basis of a favourable construction.[1]

Similarly, if the testator were to say to his heirs, "if Zaid come and claim anything from you on my behalf, pay him the same to whatever amount," which declaration would be recognised and complied with to the amount of one-third of the estate, and the acknowledgment being thus equivalent to a bequest the declaration of Zaid must be credited to the amount of one-third of the acknowledgor's estate and no more. If, therefore, besides the acknowledgment in question, the testator had made various bequests in favour of others, one-third of his estate must be set apart for the legatees and two-thirds for the heirs. And the heirs and legatees will be called upon to declare if the testator said anything to Zaid, and if

[1] *Hedâya*, Vol. IV, p. 494.

they admit any liability, it will be discharged out of the estate and effects of the acknowledgor in proportion to the respective shares of the heirs, and the legatees must be required to verify the declaration to Zaid to such extent as they may think proper." Now, if both parties acknowledge that there is something owing to Zaid, it is evident that there rests a debt upon the estate affecting the shares of each respectively and consequently this being so, it follows that if Zaid should claim more than what is admitted by the heirs and legatees, [and has no other proof, excepting the unspecific acknowledgment of the testator,] the affirmation on oath of the heirs and legatees, "to the best of their knowledge, or, in other words, to the effect that they do not know of any more being due to Zaid" will be believed : "for they cannot be required to swear positively, as their oath regards a matter between the claimant and the acknowledgor merely, and in which they are not principals."

If a person bequeath any article jointly to one of his heirs and a stranger, in this case the bequest in favour of the heir is not admitted, and a moiety only of the legacy is given to the stranger, because as an heir possesses the capacity of being a legatee, he therefore obstructs the stranger in the title which he would otherwise have to the complete legacy. It is not so when a legacy is left between one person living and another dead, for here the whole goes to the living legatee, since a dead person cannot take a bequest.

The capacity of an infant.

Regarding the capacity of an infant to make a testamentary disposition, the divergence between the schools is very great. The Shiah Law declares that perfect intellect and freedom are indispensably requisite to the validity of a bequest, and the will of a

Shiah Law.

majnûn[1] and of a *sabi* (youth or child) under ten years of age is not valid ; when he has attained to that age all bequests by him for proper purposes in favour of his relatives and others are lawful according to the most common and approved doctrine, *if he is capable of discernment.*

Shâfeï and Mâliki doctrines.

The Shâfeïs and Mâlikis agree generally with the Shiahs. According to the Shâfeï doctrines, an infant may validly constitute a *wasiat* if he is morally in a condition to understand the nature of his act.[2] In other words, there is no hard and fast rule as to

[1] *Sharâya*, p 247.

[2] Sautayra, p. 319

the limit of age where capacity would be presumed. The Mâlikis, also, do not regard infancy in itself a disablility, but the jurists of this school do not seem to be agreed as to the characteristics of a *wasiat* made by an infant. Whilst some of them hold that only such dispositions by a minor should be regarded as valid as are in favour of pious objects, others are of opinion that the right of a minor to make a *wasiat* should not be restricted to these objects alone, but should be extended to all dispositions when it appears that they are not contradictory and the minor possesses the comprehension to understand the nature of his act.

Hanafî doctrines.

The Hanafîs, on the other hand, consider an infant who has not attained puberty as wanting in reason or comprehension and refuse him the power of making a *wasiat*. The *Multaka* expressly declares "that the validity of a *wasiat* requires several conditions, one of them being that the testator should be adult." So also the *Fatâwa Alamgiri*; "a bequest by a youth under puberty whether he be a *murâhik*[1] (adolescent) or not is unlawful according to us. And it makes no difference whether the youth be permitted to trade or be under inhibition, or whether he die before or after puberty. So also, though he should say, 'If I arrive at majority, a third of my property is to such an one,' the *wasiat* is not valid for want of competency at the time of making it." According to the *Radd-ul-Muhtâr*, "the *wasiat* of a minor though possessed of discernment, is not valid, except with respect to the provision for his funeral expenses, (on the authority of Omar [may God be pleased with him] in the matter of a *wasiat* of an adolescent)." The *Hedâya* points out the difference between the Hanafî and Shâfeï Law in some detail. "Bequest by an infant is not valid. Shâfeï maintains that it is valid, provided it be made to a discreet and advisable purpose, because Omar confirmed the will of a *sabi* (that is a boy who has nearly reached the age of maturity), and also because in the execution of it a degree of advantage results to the infant inasmuch as he acquires the merit of the deed—whereas in the annulment of it he is deprived of all advantage. The arguments of 'our' doctors in support of their opinion upon this point are twofold. First, a will is a voluntary act concerning which an infant has not a capacity of forming a proper judgment. Secondly, the

[1] One approaching puberty.

declaration of an infant is not of a binding nature, but if the validity of a bequest by such were admitted, that effect would follow of course. With regard to the tradition of Omar, the term *sabi* there used must be understood to mean a person just arrived at the age of maturity, or 'the will of the *sabi*' relates merely to the celebration of the obsequies which is lawful in the opinion of 'our' doctors. Besides the annulment of the will is advantageous to the infant, since in allowing his property to pass to the heirs, the rights of natural affection are maintained, as before mentioned. With respect to the assertion of Shâfeï that in the execution of the will an advantage results to the infant, it may be replied that the point to be attended to in cases of advantage or loss is the immediate tendency of any act or deed, and not what may eventually result from it; in other words, if the deed itself in its immediate tendency produce advantage, the execution of it on account of the infant is preferable, but in the case here considered the deed (that is, the bequest) in its immediate tendency leads to a loss of property, although eventually the infant have an advantage, the bequest having been made with a view to obtain merit in the eye of God, and since the bequest of the infant in its immediate tendency occasions a loss, it is not valid; in the same manner as holds in case of a divorce, in other words, if an infant divorce his wife or his guardian do so on his behalf, it is not binding notwithstanding a divorce may on many occasions be attended with advantage, as where an infant having a wife who is poor wishes to divorce her and marry her sister who is rich and handsome. In short, bequest by an infant is invalid according to 'our' doctors, and in the same manner if an infant should make a will and die after he had attained to maturity, the will is not valid as having been made at a time when he was unqualified for such an act, and so likewise if an infant should say, 'It is my will whenever I reach the age of maturity that a third of my estate be considered as a legacy in favour of a particular person,' the will is not valid, because an infant being unqualified, is not competent to make a will that shall be deemed valid immediately, or that can be rendered so by being suspended to a future period, in the same manner as he is incapable of divorce or emancipation.[1] It is otherwise with respect to a

[1] Comp the *Radd-ul-Muhtâr*, Vo'. V, p. 645.

slave or a *mokatib*, for they possess a complete competency obstructed merely by the right of their master, and therefore all their acts (such as divorce, bequest or so forth) are perfectly valid if referred to a period when that bar no longer exists, as where a slave (for instance) says, 'I declare my wife to be divorced whenever I am free."

The provisions of the Hanafî Law amount to this, that an infant *under the age of puberty* does not possess the capacity of making a disposition of his property by will. What would be the limit of age under the Indian Majority Act (Act IX of 1875) is a question which has been considered at some length at a previous stage of this work.[1] But a *wasiat* made by a minor becomes effective *ab initio* upon his confirming or ratifying the same after attaining majority.[2]

As regards the capacity of a person who is condemned to death for an offence, there is no provision in the law to deprive him of the power of making a will. A soldier engaged in an expedition, a person travelling and away from his property, in fact every sane and free person, whether man or woman, can validly make a bequest.

Difference of creed is no objection to the power of devising by will. The *Multaka* lays this down expressly ; "the difference of religion between the testator and the legatee is no ground for impugning the lawfulness of a *wasiat*. Accordingly, a Mussulman can make a disposition in favour of a non-Moslem (unless he is an alien) as a non-Moslem can make one in favour of a Mussulman."[3] With regard to the validity of a will made by a Moslem who afterwards apostatises there seems to be some divergence between the schools. According to the Mâlikis the *wasiat* is annulled by the fact of apostacy. According to the Hanafîs, the will would have effect given to it if it is valid according to the sect to which he has apostatised.[4]

"If a Moslem should apostatise to Christianity, Judaism or Magianism and then make some of the bequests referred to, such of them as would be valid, if made by a Moslem, remain in suspense until he returns to the faith or is put to death, or dies naturally, or takes refuge in a foreign country, and such of them as are not

[1] See *ante*, p. 48. [2] *Fatâwa Alamgiri*. [3] The Shâfeîs differ. [4] Baillie's Dig., p. 675.

valid, if made by a Moslem, are void according to Abû Hanîfa; but according to the two Disciples, the acts of an apostate are operative for the present, so that whatever is valid according to the sect to which he apostatises is valid in him, and if the bequest be an act of piety with them, but sin with 'us,' it is valid though to a sect of persons who are not particularised. With regard to a female apostate, her bequests are valid so far as the bequests of the sect to which she has apostatised would be valid, because she is not liable to be put to death for her apostacy."[1]

Bequests of an insolvent testator.

Another essential requisite to the validity of a testamentary disposition is, that the testator should be proprietor of the subject of the will or should be entitled to it when it happens to be a right.[2]

But when the subject of the bequest is the property of the testator who is so burdened with debt that his liabilities exceed his assets, the disposition will not have effect given to it unless the creditors discharge the estate from the payment of their debts.[3]

The Shiah doctrines on this point are explained thus in the *Sharâya*:[4]—"When a person who is in debt directs by will the emancipation of his slave,[5] and the value of the slave is twice the

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[1] *Alamgiri*, Vol. VI, p. 141; Baillie's Dig., p. 675; *Radd-ul-Muhtâr*, Vol. V, p. 643; *Hedâya*, Vol IV, p. 537.

[2] Sautayra, p. 421.

[3] In the *Alamgiri* this principle is stated as follows:—"When a man makes a bequest, being in debt to the full amount of all his property, the bequest is not lawful, unless the creditors agree to release the property *pro tanto*." It will be observed that the way in which the principle is stated here is in its effects somewhat different from the principle as given in the text. And the English version of the *Hedâya* accentuates the difference in the following passage: "if a person," it says, "deeply involved, bequeathes any legacies, such bequest is unlawful and of no effect, because debts have a preference to bequests, and the discharge of debts is an absolute duty, whereas bequests are gratuitous and voluntary, and that which is most indispensable must be first considered. If, however, the creditors of the deceased relinquish their claims, the bequest is then valid, the obstacle to it being removed, and the legatee being supposed to stand in need of his legacy." But an analysis of the expressions used in all the texts shows clearly that the dicta refer to the invalidity of testamentary dispositions by persons whose debts leave no margin for the payment of legacies, and who, to use the Arabian phraseology, are "drowned in debt."

[4] *Jawâhir-ul-Kalâm*; *Sharâya*.

[5] The illustration is somewhat characteristic of the modes of thought prevailing at this time, but it seems to explain fully the meaning.

amount of the debt, the slave is emancipated, but must labour for five-sixths of his value, but if the value of the slave is less than the debt the legacy is valid. The reason is that debts taking precedence of legacies must be first discharged, and it is only out of a third of what remains of the estate that the emancipation can take effect. It is otherwise in the case of a gratuitous emancipation by a master on his death-bed when the law is, as before mentioned, on the ground of an express decision recorded by Abdur Rahmân as coming from the Imâm Jaâfar as-Sâdik on whom be peace."

A *wasiat* is lawful for any purpose which is considered proper under the law, and which may be carried into effect at the time of the testator's decease. The principles, however, are subject to certain limitations, the consideration of which is necessary before we come to the discussion of the persons for whom a *wasiat* may validly be constituted.

(1) A *wasiat* in favour of a person who intentionally causes the death of the testator is unlawful according to all the schools. According to the Hanafîs, a bequest is not lawful to a person who causes the death of the testator even unintentionally, by accident or misadventure, unless the person causing the death is an infant or insane.[1] According to the Hanafîs, the bequest is unlawful whether it was made before or after the death-wound. But if the heirs assent to the bequest it would be valid according to Abû Hanîfa and Mohammed, though not according to Abû Yusuf. When the death is caused by an infant or a lunatic legatee, the assent of the heirs is not necessary to the validity of the bequest. "The Prophet has declared," says the *Radd-ul-Muhtâr*, "there is no legacy for the person slaying, for he has hastened an event which God might have delayed, and therefore a bequest to the murderer is unlawful whether it was made before the mortal wound was given or subsequently, for the tradition is general, and this is the view of Zailye. By hastening the event is meant that the act of the murderer is the immediate cause of the death of the deceased, for otherwise, as held by the followers of the true doctrine, the death is an event which was inevitable." "If a person simply wounds another, but the actual slaying is done by a third person, the legacy to the

Bequest to a slayer invalid.

[1] "This exception in favour of an infant and a lunatic is made," says the *Radd-ul-Muhtâr*, "because they are not liable to punishment"

person wounding is not invalid, for he is not the murderer, this is the view of Ul'al-walji. The person causing the death of another forfeits the legacy whether his act was intentional, or the result of accident, or misadventure, for example, if a man digs a well and the person who has left him a legacy falls into it, the legatee forfeits the legacy."

"A bequest to a slayer will be valid according to Abû Hanîfa and Mohammed if the heirs of the testator should consent. Abû Yusuf, however, disagrees on this point, and holds that it is absolutely void though the heirs should consent. According to Sharnibilalieh, a bequest made before the murder is void according to all of them though the heirs should consent."[1]

Mâliki doctrine.

According to the Mâlikis the testator has the power of condoning the offence committed on his person, and if after receiving the mortal wound he makes a *wasiat* in favour of the person causing the wound, it will be presumed that he pardoned the offence and the bequest would be valid.

Shiah principle.

According to the Shiahs, the homicide must be intentional to avoid the legacy to the person causing the death. According to

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[1] "A bequest," says the *Alamgiri*, "to a person who slays the testator either intentionally or by accident is not lawful whether the bequest were made before the death-wound or after it. But if the heirs assent to the bequest, it is lawful according to Abû Hanîfa and Mohammed. And if the slayer be a youth under puberty or insane the bequest to him is lawful without the consent of the heirs, or if the slayer be himself the sole heir, a bequest to him is lawful according to Abû Hanîfa and Mohammed. A bequest to the *mokâtib* or *mudubbar* or *umm-ul-walad* of the slayer is also unlawful without the consent of the heirs."

The *Hedâya* states as follows:—"If a person makes a bequest in favour of another from whom he has received a mortal wound, it is not valid whether the murderer be one of his heirs or a stranger, or whether he may have wounded him wilfully or by misadventure provided he be the actual perpetrator of the deed because it is recorded in the traditions that there is no legacy for a murderer, and also as the person who gave the wound has hastened the death of the testator, he is by way of punishment excluded from the benefit of the will in the same manner as a person under similar circumstance is excluded from inheritance. So likewise where a man having made a bequest in favour of a particular person is afterwards killed by that person, such bequest is invalid. If, however, in these cases the heirs should give their consent the bequest then becomes valid according to Abû Hanîfa and Mohammed. Abû Yusuf is of a contrary opinion because the offence of the murderer which is the cause of the invalidity of the will still exists." The former view is the one generally accepted by the sect.

the Hanafî Law if the person causing the death is the only heir of the testator, the bequest to him would be lawful according to Abû Hanîfa and Mohammed, though not according to Abû Yusuf.

But though a legacy to one's murderer or homicide is unlawful, a bequest in favour of his parents, children or any other ascendants or descendants would be lawful.

(2) According to all the schools a bequest to any one of the heirs is invalid without the consent of the others.

Bequest to an heir.

" A bequest " says the *Radd-ul-Muhtâr* " to a stranger (or non-heir) is valid to the extent of one-third of the testator's estate, but it may be validated respecting a larger proportion with the assent of the heirs after the death of the testator ; *consent given during the lifetime of the testator is of no effect ;* the consent in order to be effectual must be not only after the death of the testator, but the parties must be adult and *sui juris.* The consent of heirs before the death of the testator is ineffectual because the right to the inheritance does not vest in them until his death. When consent is given according to 'us,' the legatee would derive his title from the testator; according to Shâfeï, the right will be derived from the consenting heir. When some of the heirs consent and others do not, the legacy will be valid in proportion to the share of the assenting heirs. It is requisite that the consenting heirs should be adult and possessed of understanding, that is, sane. Consequently the consent of the infant and the insane is not valid. The consent of the person who is sick is subject to the same rules as his legacy. Whether a person is an heir or not must be considered with reference to his right of inheritance at the time of the testator's death. Therefore, when a person leaves a legacy to his brother at a time when he has no children, and afterwards children are born to him and he dies, the legacy to the brother is valid, for in the presence of the children he has no right of inheritance. Similarly, if a person makes a bequest for his wife and afterwards divorces her, the legacy would be valid for she is not an heir at the time of the testator's death ; the marriage relation having been dissolved, the right of inheritance also falls to the ground."[1]

Hanafi doctrine.

If the heir is sane and adult and, therefore, possessed of the capacity of disposition but happens to give his consent at a time

[1] *Radd-ul-Muhtâr*, Vol. V, p 644.

when he is suffering from illness, if he recovers from that illness, his consent is valid. But if he dies of the illness, his assent will have the same effect as if it was a bequest, so that if the original legatee was an heir of the assenting heir, the assent is not lawful unless concurred in by the other heirs of the sick person, but if the original legatee was not the heir of the assenting heir who has died, the assent will validate the legacy to the extent of one-third of his share in the inheritance of the original testator.[1]

But though a bequest in favour of an heir is invalid, an *ikrâr* or acknowledgment of a debt as stated before is valid.[2]

If a man make a bequest in favour of a part of his heirs, it is not valid because of a traditional saying of the Prophet, "God has allotted to every heir his particular right," and also because a will in favour or a part of the heirs is an injury to the rest, and therefore if it were deemed legal, it would induce a breach of the ties of kindred. Besides it is said in the traditions "a bequest to particular heirs is unjust." It is to be observed that in judging whether the legatee be an heir or otherwise, regard is paid to the time of the testator's death and not, as pointed out already, to the period of making the will. If some of the heirs should give their consent and part withhold it, the bequest then becomes valid in porportion to the amount of the shares of those who consent, and invalid in proportion to the amount of the share of the others.

To recapitulate :—The persons who cannot be excluded from succession by a testamentary disposition are those who are entitled to a share in the inheritance of the testator upon his decease whatever may be the category of their heirship. This principle is founded upon the direction contained in Chap. IV, verse 7 of the Koran : "To every one have we appointed kinsfolk as heirs from their parents and relatives, and those with whom we have joined their right hands ; so give them their portions, for verily God is over all a witness." The rights of the heirs, say the jurists, are thus irrevocably fixed by the Koran, and the harmony which has been established by the divine law among the different degrees of relations who would be entitled to succession to the estate of a deceased person should not be broken by his leaving a larger share to one

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[1] *Ibid* Comp. Baillie's Dig, p 626, *Alamgiri*, Vol. V, p 148

[2] See *ante*, p. 451, *Radd-ul-Muhtâr*, Vol. V, p 644, *Hedâya*, Vol. IV, p 472.

heir. The author of the *Multaka* has declared in consequence that a testamentary disposition is null from the time when the succession opens, when the legatee is an heir, and the Mâliki lawyer, Khalîl-ibn-Ishâk, has declared that all legacies to the heirs are void.

In consequence of these directions, the Mussulmans scarcely ever make bequests in favour of an heir. When they intend making any variation in the shares of their heirs, they either make a *hiba* or an acknowledgment of debt in favour of the heir whom they desire to prefer. Occasionally, the devise is made nominally in favour of one who is not an heir but really in favour of an heir.

But a bequest in favour of a relation who is not entitled to a share in the inheritance of the testator or who, though an heir at the time of making a devise, is excluded by any circumstance from succession at the time when the inheritance opens, is valid in law; for example, when a person has two sons and one grandson, the son of a predeceased son, to whom he makes a bequest not exceeding one-third of his property, such bequest is valid. Similarly, if a man has a son and a daughter's son or a daughter's daughter, the daughter's son, not being an heir, a bequest to him is valid. When a person has only a brother, and no children, the bequest to him would be invalid, but if a child is born to the testator after the bequest it will be valid, provided, of course, it does not exceed the disposable third. If a man make a *wasiat* in favour of his wife, it would be invalid, but if she is divorced before his death, it would be valid.

A case given by Sautayra will exemplify one branch of these principles. A man of the name of Bou-Medina acknowledged himself to be a debtor of his wife to the extent of 250 dirhems, and subject to the payment of that debt, left all his estate and effects in equal shares to his said wife and two strangers; held under the Mahommedan Law that the debt should be first paid out of the estate, and that the estate should be thereafter divided in the following manner among the legatees and heirs,—

To the widow	...	3/12 being 3/12 = 1/4 the share of the widow
To each of the legatees		2/12 being 1/3 of the quantity disposable
To the heirs	...	5/12
Total	...	12/12

Bequest to an heir valid with consent of the other heirs.

All the schools agree in holding that a bequest in favour of an heir is invalid. A legacy, says the author of the *Multaka*, in favour of one heir is valid if the other heirs consent thereto. And the Shâfeï lawyer Abû Khoja has laid down the principle in similar terms, and the Mâliki jurist Khalîl-ibn-Ishâk has declared that where a disposition is made in favour of an heir and ratified by the other heirs, the legacy would take effect as an act of liberality on their part. According to the Shiah lawyers, as we shall show more fully hereafter, a devise in favour of heirs to the extent of one-third of the estate of the testator is valid without the consent of the other heirs, but where the devise is for more than one-third it is not valid without the consent of all the heirs. Such consent may be given either *before* or *after* the death of the testator. Under the Sunni law ratification must always be *after* the death, an assent before death being of no effect.

Under the Sunni Law apparently the assent must be a free and voluntary act on the part of the heirs, and accordingly where the testator has held out any threat in his will, the effect of which may be to bias the mind improperly, the bequest will not take effect. "A legacy to an heir," says Khalîl-ibn-Ishâk, "would be annulled when the testator has used the following expression, namely, 'If my heirs do not ratify these my dispositions my property shall go to the poor.' But a legacy expressed in the following terms: 'I bequeath such a legacy to the poor unless my heirs consent to give it to my son' is valid, because the heirs are free either to give or refuse their consent."

The voluntary assent given by the heirs during the last illness of the testator is irrevocable because the heir is supposed to have then acquired a right.

When a person has no heir he can leave his entire property to any one whom he likes.

Shiah doctrines.

The author of the *Sharâya* has laid down that when a testator has excluded one of his children from succession and left the property wholly to the others his direction is entirely invalid, and the inheritance will be apportioned among the heirs according to their legal shares. But supposing a father makes an unequal division of property among his children or other heirs to take effect after his death (a *taksîm-bil-wasiât*) if it is assented to by the heirs it is lawful without question, but if no such assent is given what would

be the effect? An example of such a case is given in the *Jâmaa-ush-Shittât*. A person who was going on a pilgrimage made a partition of his estate and effects among his children in the following manner :—(*a*) To some he gave some properties in excess of their legal shares on account of the dower due to their mother ; (*b*) to others he gave certain sums of money in excess of their shares to defray the expenses of their marriages. A question was raised by the heirs, who received smaller shares, as to the validity of the *taksîmnâmah-bil-wasiat*. The dictum of the Mujtahid was to the following effect :—

"The dower is a debt which is bound to be discharged before the payment of the legacies. The properties given in lieu thereof have been lawfully devised. The sums of money left to some of the children in excess of their legal shares are in the nature of legacies and must come out of one-third of the testator's estate. The remainder of the property must be divided among the children according to their legal shares."[1]

A bequest in excess of the one-third is valid with the assent of the heirs. When there are several heirs, and one or more of them allows the excess it is valid to the extent of his share in it. The assent of an heir is effective when conceded after the testator's death. Whether it is equally valid before his death is a question on which there are two opinions, the more common and approved of which is in favour of its being binding on the heir. When the consent is interposed after the testator's death, it is a ratification of his act and not a gift *de novo* from the heir, consequently it does not require possession by the legatee to complete its validity.

(3) A *wasiat* by a Moslem in favour of an alien infidel is unlawful according to all the schools [2]

(4) Bequests for the following purposes were discountenanced by the old Hanafî Law.[3]

"If a person should direct by his will that his body after his death should be carried to a certain place and there interred, and that a *rubât* is to be erected at the place, Abu'l Kâsim has held that the

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[1] *Jâmaa ush-Shittât* Comp. Baillie's *Imâmia Law*, p 233

[2] *Radd-ul-Muhtâr*, Vol. V, p. 643. *Fatâwa Alamgiri*, Vol VI, p 141 *Sharâya, Jawâhir-ul Kalâm*

[3] Baillie's Dig, p 633

bequest is lawful as to the *rubât*, but is void as to the removal of the body, and that if the executor should incur any expense in removing it without the sanction of the heirs he will be responsible for the amount expended, though if he has their authority for the removal he does not incur any responsibility. A direction by will to ornament the testator's tomb is void. But with regard to a direction to provide food for mourners after the testators's death and for those who may be present at his funeral, the lawyer Abû Jaafar has said that it is lawful as regards a third of the estate, and that all may lawfully partake of the provision who prolong their stay at the funeral, or who come from a distance, rich and poor alike, but that if there is any lavish expenditure in the preparations the executor is liable for the excess. According to Shaikh Imâm Abû Bakr of Balkh, a direction by will to provide food for three days after the testator's death is void. * * * In the *Wakiât-i-Natiki* it is stated that if a person should direct that a thousand dinars or ten thousand dirhems be expended on his shroud, no more than a medium expense is to be incurred on that account and only the cloth which the testator used, for going to the mosque on Fridays should be used. And if a woman should direct her husband to pay for her shroud out of the dower due to her by him, it has been said that whatever she may direct or forbid on that subject, is a like void. When a person directs that he shall be buried in his mansion, the bequest is void unless he direct the mansion is to be converted into a general cemetery for Moslems. A direction that the testator's grave be plastered and a vault or arch placed over it is unlawful except in places where such precautions are required against the ravages of wild beasts. So also a direction that so much of one's property be given to persons for reading the Koran over the testator's grave is void even though special readers be appointed for the purpose." This passage embodies a number of sumptuary regulations which, according to present usage, have fallen into complete desuetude.[1]

[1] See the *Radd-ul-Muhtâr*, p. 677. The illegality of hiring a person for reading the Koran over the grave of the testator is founded on the unlawfulness of hiring people for performing one's devotions, "it is only in cases of necessity," says the *Radd*, "that persons may be hired to perform devotional functions, such as the teaching of the Koran or law or performing the *azân*. The jurists are agreed that a person cannot be hired for performing fasts,

Under the Shiah Law bequests are lawful for the following purposes :— Shiah Law.

(*a*) for offering prayers for the testator in perpetuity or for a limited period ;

(*b*) for carrying the body of the deceased to Kerbela or any other holy place ;

(*c*) for some one to perform a pilgrimage on behalf of the testator ;

(*d*) for burning lights and putting flowers on his grave or in the shrines of the Imâms ;

(*e*) for relieving the poor Syeds of Kerbela and Najaf ;

(*f*) for feeding the poor on particular holy festivals ;

(*g*) for reading *mursias* (elegies) in the Imâmbaras ;

(*h*) for offering *sherbet* or supplying water in the time of *Moharram* and such like objects ;

(*i*) A *wasiat* may be made by one person to another for the performance of religious ceremonies on the testator's behalf ; for example, *A* on the point of death may ask *B* to perform the prayers which he has left unperformed during his lifetime, and *B* accepts the *wasiat*, it is valid and he will be bound to perform the same.[1]

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prayers, *hajj*, etc" As regards the reading of the Koran over a grave, the modern doctrine, founded on Mohammed's opinion, is that it is legal See the *Appendix*

[1] *Jâmaa-ush Shittât*

CHAPTER XIX.

THE CONSTITUTION OF A WASIAT.

SECTION I.

WHO MAY BE LEGATEES OR DEVISEES.

The Musa-lahu.

IN principle, a *wasiat* is lawful for any person or object actually or constructively in existence at the time of the disposition.[1] "It is an indispensable condition," says the *Sharâya*, "that the legatee be in existence at the time of the bequest, and if he should not be alive, the legacy is not valid, in the same way as a legacy to a person deceased, or to one supposed to be alive, but who is afterwards proved to have been dead at the time of the bequests." So also it is stated in the *Alamgiri*, that "there is no bequest for the *non-existing* or the dead."

We will now consider the objects or persons in whose favour a *wasiat* may validly be made:—(*a*) with the exception of the Shâfeïs, who regard a bequest by a Moslem to a non-Moslem to be unqualifiedly unlawful, all the other schools admit the validity of a *wasiat* in favour of a non-Moslem who does not belong to the *Dâr-ul-Harb* and consequently is not an alien.[2] The *Radd-ul-Muhtâr* and the *Alamgiri* lay down this principle with the utmost distinctness. "A Moslem," says the *Alamgiri*, "may lawfully make a bequest to a *Zimmi* or *vice versâ*, but a bequest to an alien who is not a *Mustâmin* is not lawful. If a Moslem make a bequest to an alien

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[1] *Radd-ul-Muhtâr*, Vol V, p 661; I L. R, 9 Bom, p 158.

[2] For the reasons which compelled the Moslems to withhold the privilege from the *Harbis*, see "*The Spirit of Islâm*." The Mahommedan Law is decidedly more generous than the English Law was until a few years ago The incapacity of aliens in England was removed only in 1870.

living in a *dâr-ul-harb* or hostile country, the bequest is not lawful, even though the heirs should give their consent. And if the alien should come into Moslem territories under an *âmân* or protection, intending to take his legacy, he cannot do so even with the consent of the heirs. This is when the testator and the alien legatee were both in the *dâr-ul-Islâm* at the time. If the testator were also in the *dâr-ul-harb* 'our' doctors differ as to the legality of the bequest. When the alien is a *Mustâmin* residing in Moslem territory, it seems, on the authority of the *Zâhir-ur-Rawâyèt*, that a bequest to him would be lawful to the extent of a third of the testator's property without the consent of the heirs and beyond that amount with their consent."[1]

A similar rule obtains among the Shiahs on the subject. The *Sharâya* declares,—"With regard again to legacies in favour of *harbis* or hostile infidels there is some doubt, but according to the most authentic traditions they are forbidden and null."[2] And in the *Radd-ul-Muhtâr* a *harbi* or hostile non-Moslem is regarded as civilly dead.[3]

But whilst a devise by will is invalid in favour of an alien, presents and gratuities may lawfully be made to him. "In the *Sharh-ul-Kabîr* of Sarakhsi it is stated," says the *Radd-ul-Muhtâr* "that there is no objection to a Moslem making presents or giving rewards to infidels whether they be relatives or not, and whether they be aliens or *Zimmis*, and the legality of this is founded on the tradition that the Prophet (may the blessings of God rest on him) sent various presents to Abû Sufiân ibn Harb and Sufiân ibn Ommeyya for distribution among the poor of Mecca.[4] And the reason of this is that presents to one's relations is commendable to every man and acceptable in every religion, and to strangers because it is an act of kindness and generosity. Accordingly, presents may be made lawfully to aliens, excepting of arms and armour."[5] But a bequest to an apostate is not lawful under any of the schools.[6]

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[1] For the rules relating to the Wills of non-Moslem subjects of Mussalman sovereigns, see *post*.

[2] *Sharâya*; Bailie's *Imâmia Law*, p. 244.

[3] Who were infidels at the time.

[4] *Radd-ul-Muhtâr*, Vol V, p. 643

[5] *Radd-ul-Muhtâr*, Vol. V, p. 664.

[6] *Fatâwa Alamgiri*, Vol. VI, pp 140; *Sharâya*; Santayra, II, p. 342. Act XXI of 1850 makes no difference in the provisions of the Mahommedan Law on this subject

Bequest to an infant *en ventre sa mère*.

(*b*) A disposition in favour of an infant *en ventre sa mère* is valid according to all the sects, but according to the Hanafi Law, the child should be born within six months from the date of the *wasiat*, in which case it is presumed to have been in existence at the time of the bequest.[1] In the case of infants (including an infant *en ventre sa mère*), acceptance will be presumed unless it would cause injury to the devisee or legatee. The right of the infant *en ventre sa mère* to the bequest is established upon birth, and until then no person can exercise any right on its behalf, for example, commute the bequest or compromise the claim of the unborn legatee. The *Radd-ul-Muhtâr* expressly lays down that for the "child in the womb there is no *wali*,[2] for the word (*mowla*) requires a *wali* in order to secure tender care and the infant in the womb does not stand in that need; as a matter of fact it is a part of the mother, and as there is on the part of the father no right of guardianship in respect of the mother, consequently the father cannot be the *wali* of the child in the womb, nor can the mother be the *wali* of the child in her womb, and accordingly she cannot exercise any right in respect of any legacy left to such child, for though it is a part of her body, yet really it is a soul entrusted to her charge, *and the soul being in existence a bequest to it is lawful.*"[3] "A *wasiat* is from one point of view *tamlîk* and from another point of view appointing a successor to the rights of the testator (in a portion or the whole of his estate), and therefore though no *wali* can be appointed for an infant *en ventre sa mère*, according to all the authorities, such as Allâmah Ibn-Shibli, Halwâni and other *Mashâikh*, an appointment of a *wasi* or executor for such an infant is lawful, as is lawful the appointment of a *wasi* in the case of a *wakf* for unborn children. Such appointment takes effect upon the birth of the child when its right vests in the bequest."[4]

When the father of the child is alive, the birth of the child should be within six months from the date of the bequest in order

[1] A bequest to a child in the womb if born within six months from the date of the bequest is valid; *Fatâwa Alamgiri*, Vol. VI, p. 140. *Radd-ul-Muhtâr*, Vol. V, p. 661. Baillie's Dig., p. 627. In the *Nihâya* it is stated that the six months should be computed from the date of the death of the testator *Radd-ul-Muhtâr*, Vol. V, p. 662

[2] "A fœtus can neither be constituted a *wali* (guardian), nor can a *wali* be constituted for it"

[3] *Radd ul-Muhtâr*, Vol. V, p 642. [4] *Ibid.*

that the right to the legacy may vest in it, but when the father is dead or the mother is divorced, the birth should be within six months from date of bequest and within the longest period of gestation (recognised by law) computed from the date of the father's death or the *talâk* of the mother. For, should the birth take place after this period, the child cannot be presumed to have been conceived at the time of the bequest.

But though a direct *wasiat* or a legacy, in other words, a testamentary gift to an unborn child is valid only when it is *en ventre sa mère* and is born within six months from the date of the bequest, yet the law recognises the validity of a *waḳf bi'l wasiut, viz.* (a testamentary *wakf*) in favour of unborn children to come into existence at any time, *when a commencement is made with a person in existence.* For example, a *wasiat* in favour of *A* (a living person) and his unborn children and descendants in perpetuity *is valid according to all the schools.* Such a *wakf* will have effect given to it by the appointment of *wasis* who would carry out the trusts of the *wakf.*

Under the Shiah Law there is no restriction as to the time when the child should be born to take the benefit of the bequest. It will be sufficient if the child is born within the longest period of gestation recognised by the Shiah Law from the date of the bequest.[1] "A bequest to a fœtus in the womb actually existent is valid, but it requires that the child be produced alive, and if it is still-born, the *wasiat* is void; while if it is born alive, though it should die immediately after, the legacy descends to its heirs."[2] Shiah Law.

Under the Hanafî Law a child must also be born alive to be entitled to the legacy. "When a person makes a bequest to what is in the womb of a woman and she is delivered of a dead child, after his death, and a month after the bequest, the legacy is not for such child, but if the child be born alive, and then die, the bequest is lawful to the extent of a third of the testator's property, and is divisible among the the child's heirs. If the woman should bring forth two children, one dead and the other alive, the living child takes the whole legacy, but if both be born alive and one of them

[1] See the *Personal Law of the Mahommedans*, p 150.

[2] *Sharâya-ul-Islâm*, p. 253 There is a distinction between a bequest to a fœtus and the bequest of a fœtus.

die, the legacy is divided into moieties, one for the living child and the other for the heirs of the dead one by way of inheritance. When a person makes a bequest in these terms : 'If there be in the womb of such a person a girl, she is to have a legacy of a thousand dirhems, and if there be a boy, I bequeath to him two thousand dirhems,' and the woman is delivered of a girl within a day of the six months after the bequest, and of a boy two or three days later, the legacies to both are valid to the extent of a third of the estate."[1]

(3) A *wasiat* is also lawful in favour of the following objects :—

(*a*) To the poor generally or a particular body of them ;

(*b*) To the Holy Shrine of Kaaba or any mosque ;

(*c*) To Almighty God or to spend in the way of God (*sabîl illah*) ;

(*d*) For *wujûh-u-khair*, or *wujûh-ul-birr* (good or meritorious purposes) generally ;

(*e*) "To fight in the way of God," *i.e.*, in the propagation of the Faith ;

(*f*) For the children of one's heir, the kindred, neighbours, *kowm*, *&c.* ;

(*g*) For the emancipation of slaves ;

(*h*) For the payment of one's debts ;

(*i*) A bequest for feeding cattle is also lawful.[2]

(*a*) A bequest for the poor is lawful. It may be for the poor generally or for a particular body of them. According to the Hanafî Law, "it is lawful for a Moslem to make a *wasiat* in favour of poor Christians, for that is no sin, contrary to building a church for them which is sinful, and he who assists in building churches for them is a sinner."[3] And this principle applies to the poor of all creeds. Therefore, when a *wasiat* is generally for the poor, it would be applied to the poor of all creeds. Under the Shiah Law, it is different. "When a Moslem," says the *Sharâya*, "has made a bequest to beggars [in general terms], it is payable only to those of his own religion, and in like manner if the testator be an infidel such a bequest is only to those of his own persuasion." A bequest for providing shrouds to the *Moslems generally*, or for digging their graves, or constructing aqueducts for

A *wakf* for the poor. (Shiah Law.)

Abû Yusuf's views.

[1] *Alamgiri* ; Vol. VI, p 142. [2] *Radd-ul-Muhtâr*, Vol. V, p. 652.
[3] *Alamgiri*, Vol. VI, p 148.

them is bad according to Abû Yusuf as mentioned in the *Nawâdir*. But a bequest for the same or like purposes for *poor* Moslems is lawful. But this view does not seem to be followed and when a bequest is made for such purposes for Moslems *generally*, it is applied to *poor* Moslems only.

(*b*) Regarding a *wasiat* in favour of the Holy Shrine or a mosque, the *Alamgiri* provides as follows :—"If a person should bequeath a third of his estate to the Holy Shrine, the *wasiat* is lawful, and the third should be expended upon its buildings, lamps and the like ; so also the bequest of a third of one's estate to be laid out on a *masjid* is lawful, and the third should be expended on its buildings and lamps." A man may, according to all the jurists, devise his land for the construction of a mosque. Similarly, it is stated in the *Radd-ul-Muhtâr* that "where a bequest is made of a third in favour of the *Bait-ul-mukaddas*[1] (the Holy Shrine) it is lawful, and it will be applied in [maintaining] the building and lighting it and for like purposes. The same rule applies to a bequest in favour of a *masjid*, and the legacy will be applied in its maintenance and preservation, and according to Kâzi Khân, in lighting it in Ramazân [and other seasons]. In the *Mujtaba*, it is laid down, however, that when a bequest of a third is made in favour of the Kaaba, it should be expended for the benefit of the poor of the Kaaba (*i.e.*, who derive alms from there ;) and similarly in the case of *wasiats* to a *masjid* and the *Bait-ul-muakaddas*."[2] Then the author proceeds to add,—"respecting a bequest in favour of a *masjid* there are two opinions, *one* that it is not valid, and *the other* that it is valid. There is some difference among those who uphold the validity of such a *wasiat* regarding the mode of its application; some say, that it should be applied in maintaining the mosque, that is, in keeping the building in repair and in lighting it ; whilst others hold that it should be spent in charity for the poor attached to that mosque. Mohammed upholds the former view ; whilst the latter is adopted by the author of the *Mujtaba*. As regards the question of invalidity, two jurists alone hold that opinion, but when the bequest is made in specific terms that it should be spent for the mosque, it is valid by *consensus*.....It is advisable, however, to give the *Fatwa* to the effect, that when it is made in favour of a *masjid*, it should be

[1] The Holy Shrine at Jerusalem.

[2] The Kaaba.

expended in charity to the poor of that mosque. And Saijâni has explained in detail about this, and reference ought to be made to *Sharh-i-Wahbânieh* also. In the *Khulâsa* it is stated that it is preferable to spend on them, but is lawful to give to the other poor also. This is the opinion of Abû Yusuf and the *Fatwas* are given according to it."[1]

A man may lawfully devise by will his land in favour of a *masjid*, though according to Abû Hanîfa, he may not bequeath the same to make a burying-ground for the indigent, or for the purpose of erecting an inn for the passers-by.[2] It is somewhat difficult to understand the reason of this distinction. The Disciples, however, differ from the master and uphold bequests in favour of the latter objects also.

(*c*) When a person makes a *wasiat* in the following terms, "I bequeath a third of my property to Almighty God," the devise is valid according to Mohammed,[3] and it would be applied or expended on good objects, *i.e.*, meritorious or pious purposes generally. A *wasiat fi-sabîl-illâh*, (*i.e.*, in the way of God) will be applied in striving to spread the religion, and can be applied lawfully to the help of a poor Hâji who has lost his means. In the *Nawâzil* it is stated, the bequest may be applied in lighting lamps and promoting religion generally. According to the Shiah Law, "if the testator should direct a bequest to be expended in the way of God, it must be applied in some way for which reward is promised in a future state, but according to some exclusively in the propagation of the Faith. The first opinion, however, appears to be *better founded*."[4]

Shiah doctrines.

(*d*) When the bequest is made for good purpose (*wujûh-ul-khair* or *wujûh-ul-birr*, *objects of charity or liberality*), it includes

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[1] *Radd-ul-Muhtâr*, Vol. V., pp. 652, 653. [2] *Alamgiri*, Vol VI., p. 149.

The following passage which occurs in the *Alamgiri* must be read with the light of the comment in the *Radd-ul-Muhtâr*. "When a person has said I have bequeathed a hundred dirhems to such a masjid, or such a bridge, the bequest is valid according to Mohammed, and should be laid out in repairing and improving it, but according to Ibn Ziyâd when no mention has been made of repairs and improvements, the bequest is void, and the *Fatwa* is in accordance with his opinion."

[3] "And decisions are given according to his word"—*Radd-ul-Muhtâr*, Abû Hanîfa holds such a bequest void

[4] *Mafâtih Jawâhir-ul-Kalâm*.

all meritorious and pious objects and may be applied in erecting bridges or *masjids*, madrassas or hospitals or supporting the students of learning, or the poor, &c.[1]

"When a bequest is made 'to fight in the way of God' on the part of the testator, maintenance is to be given to a *ghâzi* or religious warrior for his sustenance in going and returning and remaining with an expedition; but no part of it is to be expended on his family, and if there is any surplus it must be restored to the heirs. Though the warrior be rich that is no objection, and the executor himself or the son of the testator may fight on his account."[2]

(*e*) A bequest is valid for the children of one's heirs without difference, since they are in the position of strangers. In fact, a legacy may validly be left to any relation who does not take a share in the inheritance.

The *Mohakkik* declares that a bequest in favour of one's kindred is highly proper whether they be his heirs or not. When a person bequeathes a legacy to his *akrab* or nearest of kin, it is to be regulated by the rules of inheritance, and nothing is to be given to a remote heir while there is a nearer in existence.

Under the Shiah Law, "If a person should make a bequest to his kindred (*zû karâbat*) it is to be understood as intended for all known to be of his (*nasab*) or the same paternal descent. Some writers have said that it includes all those who are related to him through his most remote progenitors, both father and mother, who professed the faith of Islâm; but this opinion is destitute of any testimony in its support. If, again, the bequest be to his *kown* or race it includes all those who speak the same language, and if to the people of his house (*ahl-i-bait*) it includes his children, father and paternal grandfather. Further, if he were to say to his *as-hûrah* (family), the nearest only of his *nasab* are to be understood as included in the bequest."[3]

"If a person make a bequest to his neighbours (*jirân*,) it includes, according to some doctors all those whose houses are within

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[1] "It cannot, however, be applied in erecting prisons, for that duty belongs to the Sultan."—*Radd*, Vol. V, p. 653.

[2] *Alamgiri*, Vol. VI, p 118.

[3] *Sharâya*.

forty cubits (*ziraas*) of his, in every direction. But there is another opinion, which is far-fetched and unreasonable, that extends it to the occupants of forty houses on either side of his."

(*f*) The emancipation of slaves is highly commendable under the Mahommedan Law and religion, and consequently we find the regulations, relating to the testamentary emancipation of slaves, laid down in some detail by the jurists of all the schools. The subject is, however, of no practical importance, and therefore it is unnecessary to dwell upon it.

(*g*) The testator can by will direct his executor to sell his property, and after paying his debts, invest the remainder, either as *wakf* for charitable purposes, or distribute it among his heirs.

Section II.

General Rules of Interpretation.

Rules of interpretation, (Hanafi Law).

The following rules have been adopted by the Hanafi lawyers, for the purpose of supplying a safe guide to the interpretation of devises and bequests, which may be involved in doubt and obscurity :—

(1) When the testator uses the expression, "I bequeath to the relations of my wife," the bequest would be to the benefit of her relations, both paternal as well maternal.

(2) When a legacy is left to "the nearest of kin," it would go to the maternal kindred only in default of paternal kindred.

(3) When a disposition is made in favour of the relatives of a stranger, it would be to the benefit of all his relatives, be they his blood-relatives or not.

(4) When the testator bequeathes his goods to the orphans, the blind or "the people" of such a race, or of such a locality, the legacy would be divided among all those who answer the description, without distinction of age, or sex, or fortune.

(5) When the testator makes a disposition in favour of the *heir* of *A*, and *A* dies leaving several heirs, the legacy would be divided among them, in the proportion of their legal shares.

(6) When the bequest is in these terms, "I bequeath to such a family," (mentioning it by name,) according to Abû Hanîfa, the bequest will be in favour of the head of that family. According

to Abû Yusuf and Mohammed, the legacy will be divided, as in the preceding case, among all the members of his family.

(7) When the legacy is left to the neighbours, it will go to such of them as are nearest, or whose residence is contiguous to the testator's. Abû Yusuf and Mohammed hold that if several people reside in that house, the legacy will go to all of them in equal shares including women and children.

(8) When a legacy is in favour of soldiers and "the unhappy," it does not impose on the heir, or the executor, or the Kâzi, the obligation of finding out all those people who satisfy the condition. It is allowable to the administrator or executor to distribute it among those who are forthcoming, unless they are specifically mentioned or indicated.

Bequest to a neighbour.

If a person make a bequest in the following terms :—"I bequeath one thousand *dirhems* to my *neighbour*," according to Abû Hanîfa it would go to the person whose house is contiguous to that of the testator. Abû Yusuf and Mohammed maintain that it should go to all the inhabitants of the vicinity, who belong to the same mosque. The *Fatwa*, however, is with Abû Hanîfa if only one neighbour is meant ; but if the testator meant more than one, the matter should be left to the discretion of the Judge.[1]

The passage in the *Alamgiri* on this subject is to the following effect :—"When a person bequeathes a third of his property to his neighbours, some say, that if they can be numbered, the third is to be divided among them all, rich and poor. And it is to be divided in like manner if he should say 'to the people of this *masjid*.' The definition or meaning of 'cannot be numbered,' according to Abû Yusuf is, that the persons cannot be computed without the aid of a written account ; but according to Mohammed it refers to a number exceeding a hundred. Others, however, have said that the matter should be left to the discretion of the Judge and the *Fatwa* is to that effect, though Mohammed's rule is easier. If the neighbours cannot be numbered, the legacy is void ; and so also when the legacy is to the people of the *masjid*, or of the *sijn* or prison, and they cannot be numbered. Mohammed has said that when a bequest is made to the orphans of the *banni* (posterity) of

[1] *Fatâwa Alamgiri*, Vol. VI, p 142.

a particular person and they can be numbered, the legacy is to be expended on all, in the same way as if it were on 'the orphans of *this* street' or 'of *this* mansion,' rich and poor participating alike; but if they cannot be numbered, the legacy is to be expended on the poor among them."

"With regard to who among the neighbours are entitled to share in the bequest, the *Mashâikh* are of opinion that every person may be included under the description of neighbour, whether the proprietor of a house or not, or whether a man or a woman, a Mussulman or a *Zimmi;* the term neighbour being equally applicable to all these. Abû Hanîfa also holds that an absolute slave possessed of a house in the neighbourhood is entitled to the benefit of the will."

If a person were to make a bequest in favour of his *as'hâr*,[1] all the relations of his wife within the prohibited degrees, (such as her father, brother and so forth,) are included in the description, and likewise all the relations of his father's wife (his step-mother), and of his son's wife [his daughter-in-law], within the prohibited degrees, as these all stand in the relation of *as'hâr* to the testator. It is to be observed that all the kindred of the wife within the prohibited degrees are included in the bequest, notwithstanding that she was at the time of the death of the testator observing the *iddat* from a reversible divorce. But if the divorce was irreversible, her relations are not to be included, as the existence of the relationship entitled *as'hâr* depends on the actual existence of the marriage at the time of the testator's death, and by an irreversible divorce marriage is utterly annulled.

If a person were to make a will in favour of his *relations* (*akriba*,) it is construed to be in favour of the nearest of kin within the prohibited degrees, and in their default to be in favour of the next in proximity, and so on in regular succession. According to Abû Hanîfa, the bequest in question is restricted in its operation to the prohibited relations of the testator, whereas according to the two Disciples it extends to all the descendants of the most distant progenitor, professing the faith of Islâm; whilst Shâfeï maintains that it is confined solely to the testator's father [and his offspring].

[1] People connected to him by affinity

If a person, having two paternal and two maternal uncles, were to make a will "in favour of his relations" [*akriba*], according to Abû Hanîfa, it will be in favour of the paternal uncles only. According to the Disciples, all the four uncles will be included. If, on the other hand, the testator have only one paternal and two maternal uncles, the half of the legacy in that case goes to the paternal uncle, and the other half to the two maternal uncles. If the bequest had been for the next of kin the whole legacy would go to the paternal uncle, and nothing to the two maternal uncles. When there is only one paternal uncle, he is entitled only to a moiety.[1] If, however, the testator died leaving him surviving a paternal uncle and aunt and a maternal uncle and aunt, the legacy would be divided in equal shares between the paternal uncle and aunt both being related to him within an equal degree of affinity, and the tie of blood between them and the testator being regarded as stronger than that existing between him and the maternal uncle or aunt. A paternal aunt, moreover, although she is not entitled to inherit, is nevertheless capable of taking a legacy, "in the same manner," adds the *Radd-ul-Muhtâr*, "as a relation who is a slave or an infidel." In all these cases, if the testator leaves no relation within the prohibited degrees, the bequest is null, because it is confined in its operation to those relations only.

When a bequest is made in favour of the orphans, the blind, the lame, or the widows of the race of a particular individual, and they are determinate in their number, the bequest would be in favour of all of them indiscriminately, whether rich or poor, male or female; for the execution of the bequest is practicable in this instance because of the ascertainment of the legatees. According to Abû Yusuf, this phrase, "if they can be enumerated" comprehends as many as can be counted, without the aid of written calculations; whereas Mohammed holds that it extends no further than to one hundred, any greater number being considered as beyond enumeration. Some, on the other hand, allege that the determination of this point rests entirely with the Kâzi *and decrees pass accordingly*. But, if the individuals of the race named be incapable of being enumerated, the poor only are included in the bequest, not the rich, for it [the bequest] is of a pious nature, and

[1] For the reasons of these principles see the *Hedya* and the *Radd in loco*.

the object of it (namely, the approval of God) is best attainable by removing the wants of the poor. Besides, as the very description used indicate a degree of want and distress on the part of the legatee, it is proper to admit this to have been the testator's meaning. It is otherwise where a person makes a bequest "to the youths or the maids of a particular race," who are innumerable; in such case the bequest is void, because, as the description used does not indicate want, the words of the testator cannot be construed to apply to the poor; neither can the bequest possibly hold valid in favour of all the individuals of the class named, since as they cannot be enumerated it is impracticable to define them, and a bequest to unknown legatees, is void. For a bequest is an act by which the testator invests another with the right of property, and it is impossible to confer that right on persons unknown. It is to be observed that in the case of bequests to the poor or distressed, the legacy must be paid at least to two paupers, two being the smallest number of plurality in *wasiat*.

Where a bequest is made to the children (*awlâd*) of the race of a particular person—the males and females have an equal right in such bequest, as the term *awlâd* comprehends all the descendants. A bequest to the heirs of a particular individual will be divided among the heirs of the person named, according to the rules of intestate succession, a male getting double the share of a female because there is reason to imagine, that the object of the testator in using the word "heirs" was, that the same distinction might be observed in the partition of the legacy, as in the case of inheritance.

If a person bequeath to a certain person a portion of his property exceeding the disposible third, his disposition will be reduced to the third.

Hanafi Law. "And when a man," says the *Alamgiri*, "has bequeathed a third of his property to one person and a third of it to another, and both bequests are allowed by the heirs, the legatees have two-thirds and the heirs one-third, and if the bequests are not allowed by them, the legatees have the third between them in halves. Where the testator has bequeathed a third of his property to one person and one-sixth to another, the reduction must be proportionate, for example, the first legatee instead of getting one-third will get two-ninths, and the second legatee one-ninth together, constituting one-third."

So also in the *Radd-ul-Muhtâr* :—"If a person were to bequeath a third of his estate and effects to Zaid, and a third to another, and the heirs do not assent to the bequest, a third will be divided equally between the two legatees. If he were to give a third to one and one-sixth to another, the third would be divided among the two in the proportion of two to one. If he were to bequeath the whole of his property to one and one-third to another, the third will be divided among them equally."

There is considerable dispute, however, as to the division of the bequest, should the heirs consent, though in the result it appears that the entire estate and effects will be divided into four *sahams* or shares, one of which will be given to the latter legatee, and three to the former.

Under the Shiah Law the second legacy would fall to the ground, the first legatee getting the entire disposible third. The *Sharâya* has stated the principle in the following terms:— Shiah Law.

"If a person should bequeath a third of his estate to one legatee, a fourth to another, and a sixth to another, and the heirs should refuse to confirm his bequests, a third of the estate is to be given to the first legatee and the other legacies are void. But if he should bequeath a third of his estate to one person, and then a third or the same portion to another, this would be a revocation of the legacy to the first in favour of the second, and should a doubt arise as to the person first mentioned it must be determined by drawing lots. If a person bequeath one article to two persons, and the value of the article exceeds a third of his estate while the heirs refuse their assent to the excess, so much of the article as is covered by a third of the estate is the joint property of the legatees. If, on the other hand, he bequeath a thing to each of the two, a beginning must be made in favour of the person to whom the bequest was made first and the deficiency must fall solely on the second."[1]

The operation of this principle extends equally to indeterminate as well as specific legacies, for example, if a person were to bequeath to another a sum of money, or a share in his inheritance, and to another that which would be sufficient for his maintenance for a limited period of time, this last legacy would be appraised or

[1] All this is when the heirs do not assent

valued, and then the two legacies will be dealt with according to the principles already stated.

Hanafi Law. When a bequest is made to two persons respectively of a half and one-fourth of the testator's estate and effects, the legatees will receive the shares given to them, provided the heirs consent, the residue going to the heirs. But if the heirs do not assent to the bequest, the legacies will have effect given to them out of the disposible one-third, which is to be divided into seven parts, four being given to the legatee of the half, and three to the legatee of the one-fourth. This is according to Abû Hanîfa; but according to Abû Yusuf and Mohammed, the third is to be divided into three shares, two of which are given to the legatee of the half, and one to the legatee of the fourth.[1]

Where a bequest is made of specific sums of money,[2] say of a thousand dirhems to one person, and two thousand dirhems to another, and the disposible third only amounts to one thousand dirhems, according to Abû Hanîfa, each legatee takes in proportion to the full amount of his legacy, and the thousand is divided between them accordingly. In all these cases, the legatee takes in proportion to the full amount of his legacy, because *primâ facie* it is valid since the testator may have left so much other property that this amount may come within a third of it. And all the jurists are agreed that when each one of several legacies does not exceed a third of the property, as for instance, when a third is bequeathed to one, and a fourth to another, and the heirs do not allow both, each legatee is entitled to a share in proportion to the full amount of his legacy whatever it may be, and the third is to be divided among them accordingly.

When a bequest is made in an indefinite form, for example, if a testator were to say, "I give a portion of my property to so-and-so," he can at any time whilst alive explain his intention. After his death the explanation of the devise rests with the heirs. If the bequest is of a *saham* or *juzz*, some hold that the heirs are entitled to give what they please, but in the *Mabsût* it is stated that the legatee of a *saham* should have the equivalent of the smallest share of the heirs, provided it does not exceed a third; this is according to the Disciples. When a person has bequeathed a *saham* of his

[1] *Fatâwa Alamgiri*, Vol VI, p. 150 [2] Technically called *mursula*.

property and leaves no heirs, the legatee takes a half; for the *bait-ul-mâl* or the treasury is in the place of a son, and the case is as if he had left two sons, when the estate would be equally divided between them.

If a person should bequeath *his son's or his daughter's share*; when he has a son or a daughter, the bequest is not valid because he is in fact giving away what belongs to another. But if he has neither son nor daughter the bequest is lawful. And if the bequest is of the *like of his son's or daughter's share*, the bequest is lawful though he should have a son or a daughter, *for the like of a thing is not the thing itself but something different.* The son's *share* is then to be ascertained, and an equal amount given to the legatee; but if that should exceed a third of the estate, the bequest requires the consent of the heirs, while if it be only equal to or less than a third it is lawful without their consent. Consequently, if a person were to make to another the bequest of a son's share, and he has only one son, the legatee will take half of his property if the heir consents, otherwise only one-third. Similarly, if he has two sons the legatee will take one-third, according to Zailye. When the testator dies leaving him surviving an only daughter, and the legacy is "of a daughter's share," the legatee will get half provided the daughter consents, otherwise one-third. If there are two daughters, the legatee will get one-third according to the *Manah*, and if there are three daughters he will get only one-fourth. And this view is supported by the reference from the *Mujtaba*, which is the work of Imâm Zâhidi. If a testator leave him surviving a son and a daughter, and the bequest is "of a daughter's share," the legatee will get one-fourth. And if a testatrix leaves a husband, and three sisters of three kinds (*e.g.*, full, consanguine and uterine) and the bequest is of the share of a consanguine sister the legatee will take one-tenth. This is the doctrine laid down in the *Majtaba*. And the *Hindièh* (*i.e.*, the *Fatâwa Alamgiri*) explains this rule thus:—the husband takes his specified share, and the residue is divided among the legatees and the sisters in the proportions fixed for them by the law. If a testator dies leaving a mother and son, and the bequest is of "a daughter's share," the property will be divided into seventeen shares, five of which will be given to the legatee, ten to the son and two to the mother.

To explain this case it is necessary first to take it as if there were no legacy, and then the estate would be divisible into six shares, whereof the mother would have one, and the son the remaining five. The bequest of a daughter's portion, if there had been one, requires an addition to be made to such a share, which being half that of a son, the addition must be two shares and a half, which would make the whole eight and a half, or doubling them to get rid of the fraction, seventeen shares, whereof the legatee takes first five shares, for the legacy is here less than a third of the estate and takes precedence of the heritage of the heirs; and of the remaining twelve shares one-sixth or two shares are given to mother and the other ten to the son.

If there be a daughter and sister, and the legacy is of a daughter's share, the legatee will take one-third whether the daughter and sister consent or not. This is laid down in the *Fatâwa Nâmia* by Saijâni.

And if a person should leave a wife and son, and make a bequest of the share of another son, if there had been one, the estate must be arranged into fifteen shares, *supposing the heirs to assent to the legacy*. Of these, the legatee would take seven shares, the wife one share, and the son seven shares. Here, as in the last case but one, let us first suppose that there was one legacy, and on that supposition the estate would be divided into eight parts, whereof the wife would take one and the son seven. But now taking the legacy as the share of another son, if there had been one, we must add seven more to the number of shares thus making them up to the fifteen. In this case, however, as the legacy is more than a third of the whole estate, the assent of the heirs is made a condition without which the legacy would not be lawful.

When a person has died leaving a daughter and a brother, and has bequeathed to another person the share of a son, there being no son the legatee has two-thirds of the estate, and the other third is divided between the daughter and brother in halves, that is, when the heirs consent to the legacy; but if they do not consent, the legatee has only one-third, and the other two-thirds are to be divided equally between the daughter and brother. When again the bequest is of *a like to the share of son if there were one*, and the other circumstances are the same, the legatee has two-fifths of the property if assented to by the heirs. When again a person has

died leaving a brother and sister, and has bequeathed to another person *the share of a son if there were one*, and the bequest is allowed by the heirs, the legatee takes the whole property, leaving nothing to the brother and sister; while if he had bequeathed *the like of the share of a son if there were one*, and the heirs had allowed the legacy, the legatee would only have a half, and the other half would be divided between the brother and sister in thirds, (that is, two portions to the male and one to the female). In both cases, if the legacy were disallowed by the heirs, the legatee would only have a third, while the other two-thirds would be divided in the same way between the brother and sister.

All this refers to cases where the testator leaves heirs behind. In default of heirs, should a testator leave a legacy, describing it as the share of a particular heir, the legatee will get one moiety and the remainder will go to the *bait-ul-mâl*. This is according to the approved doctrine and the *Jouhara*. The heir is the *sahib-i-hakk* and cannot be deprived absolutely of a share in the inheritance.[1] Under the Shiah Law, when a legacy is bequeathed to several persons or to a class of persons, it is divisible among them all equally. For example, if a person were to make a bequest in favour of his children, some of whom are males and some females, the legacy will be divided among them all equally without distinction of sex. Similarly, when the legacy is in favour of uncles and aunts, whether paternal or maternal, or both together. But where the testator has made a distinct apportionment, giving more to some than to others, his directions must be given effect to. Shiah Law.

Under the Hanafî Law, the death of the legatee in the lifetime of the testator causes the legacy to lapse; under the Shiah Law, it is different. If the legacy is not adeemed by the testator, the death of the legatee does not cause a lapse. It descends to the legatee's heirs; should he leave nobody, it would revert to those of the testator.

If a bequest is made of a third of the testator's estate to Amr and Zaid, but Amr is dead at the time of the bequest, the entire third will go to Zaid, and the rule is, that there is no right in the non-existing or dead. Abû Yusuf holds that if the testator was unaware of the death of Amr at the time of the bequest, a moiety

[1] *Radd-ul-Muhtâr*, Vol. V, p. 659.

only will be given to Zaid. This is according to Zailye. For a bequest to Amr and Zaid, when Amr is dead, is like a bequest to Zaid, and an inanimate object. But when a legacy is left *between* Amr and Zaid, and Amr is dead at the time, half alone will be given to the surviving legatee, for the word "between" implies that it was to be given in moieties."[1]

If a person were to make a bequest in the following terms, "my executor shall give one-third of my *mâl* for *A* and for the son of Abdullah, if the latter is in want at the time of my death;" and at the decease of the testator, the son of Abdullah is found to be rich, only half of the third will be given to *A*.[2]

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[1] *Radd-ul-Muhtâr*, Vol. V, p. 659.

[2] "If a man should bequeath a third of his property to Zaid and Bakr, Bakr being dead at the time, whether with or without the knowledge of the testator, or to Zaid and Bakr if he be alive, he being in fact dead, or to him and to the person in this house, no one being in the house, or to him and to his posterity (*akab*), or to him and to a child of Bakr, and his child dies before the testator, or to him and to the poor of his children, or to him who may become poor of his children, and the condition fails at the time of his death, the whole legacy is to Zaid, in all of these cases, for the non-existing or the dead can have no right, and there being no one to contend with Zaid, the legacy is the same as if it were to him alone. With regard to the case of Zaid and his posterity as they are to follow him after his death, they are to be considered as non-existing at present. In all these cases the competitor with Zaid is out of the contest from the beginning, but if he were at first competent to contend with him, and should subsequently become disqualified by failure of a condition, Zaid would have only a half. Thus, if a person should say,—'A third of my property to Zaid and Bakr if I die, he being alive or poor,' and the testator dies when Bakr is dead, or rich, or if he should say 'to him and to Bakr if he be in the house,' and he is not in it, or 'to him and the children of such an one if they became poor,' and they do not become poor till the testator dies or 'to him and to his heir;' in all these cases the legatee has only half of the third The principle in these cases is, that when the person conjoined with another has entered into a bequest, and then comes out of it by the failure of a condition, he does not occasion any accession to the right of the other, and that when he has not entered into the bequest for want of personality or competence (*ahliat*), the other takes the whole. And if one should say—'A third of my property between Zaid and Bakr,' Bakr being dead at the time, Zaid would have only a half of the third, because the word 'between' implies a division in half insomuch that if he were to say between Zaid and then stop, Zaid would have a half also, yet if one should say,' A third of my property between the sons of Zaid and the sons of Bakr,' and one of them has no sons, the whole third belongs to the sons of the other. If one should bequeath a third of his property to Zaid and to Amr, or should say

The same result would follow, if one of the legatees should die during the lifetime of the testator. The principle is this, that when the legacy is in favour of existing objects or persons, and one of them should cease to exist after the *wasiat*, the other legatees would receive their original shares and the share of the deceased legatee would lapse to the residue of the estate; but if one of the legatees was non-existing at the time, or not possessing the quality required by the testator to take the bequest, then the whole would go to the existing legatees. This is according to Zailye.[1] For example, if a bequest were made in favour of *A* and of persons residing in a particular house, the whole bequest would go to Zaid, for there is no bequest in favour of the *maadoom* or non-existing persons.[2] The same result would follow if a person were to say "for *A* and his *akab*," for *akab* are the people whom a person leaves surviving,

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between Zaid and Amr, and should then die, and one of the legatees should die after him, half of the third would belong to the survivor, and the other half of it to the heirs of the deceased legatee. So also if one of them should die after the testator, but before acceptance of the legacy and the survivor should then accept, both legatees would be entitled to the bequest But if one of them should die before the testator, the share of the legatee so dying would revert to the testator."

"When a person says: 'A third of my property to such an one and to whomsoever may become poor of the children of Abdullah' and then dies, all the children of Abdullah being rich at the time, such an one gets the whole third. But if some of them should become poor before the death of the testator, the third would be divided between such an one and the poor children of Abdullah according to the number of heads (*per capita*). If, again, the children of Abdullah had never ceased to be poor from the time of their birth to the death of the testator, it would seem that none of them would be entitled to any part of the third, but that the whole of it would devolve on the other legatee such an one If the children of Abdullah in existence at the time of the bequest should die, and other children be born to him who at first being rich should become poor before the death of the testator, the third would be divided between them and between such an one according to the number of heads. So also if the terms of the bequest were, 'A third of my property to such an one and to the child of Abdullah,' and the child of Abdullah dies but another is born to him before the death of the testator, the legacy is between such an one and that child of Abdullah. And if one should say, 'A third of my property to such an one and to the offspring of Abdullah these if they become poor' and they do not become poor till the death of the testator, such an one is entitled to a share of the third, regard being had to the number of heads." *Alamgiri*, Vol. VI, pp 161-162. Baillie's Dig, p. 642

[1] *Radd-ul-Muhtâr*, p 661. [2] *Ibid.*

and they cannot be determined at the time of the bequest. This is in the *Durrar*. Similarly, if he were to say "This legacy shall be for Zaid and for the son of Abdullah, if he lives in my house;" and the son of Abdullah were not to live in that house, the entire legacy would go to Zaid. But when a legacy is in favour of Amr and Zaid, and Amr dies after the testator's death, his share will go to his heirs.

When a woman dies leaving a husband, and having bequeathed half of her property to a stranger, the bequest is lawful, and the husband is entitled to a third and the legatee to a half, which leaves a sixth to the *bait-ul-mâl*. For the legacy to a stranger has precedence to the extent of a third over the rights of the heirs, and there remain two-thirds of the property to be divided as inheritance. Of this one half, that is, a third of the whole, belongs to the husband, leaving a third to which no other heir is entitled. The remainder of the legacy therefore becomes operative against it, and that being a sixth, the legacy is raised to a half; while there being no heir entitled to the remaining sixth, it falls to the *bait-ul-mâl*.[2] In like manner, if a man should die leaving a wife, and having bequeathed all his property to a stranger, and the widow should refuse her sanction to the bequest, she would be entitled to a sixth of the property and the legatee to the remaining five-sixths. For he is entitled to a third by virtue of the bequest, and of the remaining two-thirds the widow takes a fourth, which is equivalent to a sixth of the whole, and the legatee takes the remainder since he is preferred to the *bait-ul-mâl*.

When a man bequeathes a third of his property to the sons of a particular person, and the person has no son at the date of the bequest, but sons are subsequently born to him before the testator's death, these sons are entitled to the third.[1] And even though the person had sons at the date of the bequest, yet if they were not mentioned by their names as Ahmed, Zaid and Bakr, or otherwise specifically indicated, the bequest would be to all the sons existing at the time of the testator's death. So that if those in existence at the date of the bequest should die, and others are subsequently born who are living at the time of the testator's death, these are

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[1] *Radd-ul-Muhtâr*, Vol. V, p. 661.

[2] Under the modern rule, and there being no *bait-ul-mâl*, the share, which would have been taken by the *bait-ul-mâl*, would go to the heir.

entitled to the third of the property. If, however, the existing sons are mentioned by name, or are otherwise distinctly indicated, the bequest is only to them, and becomes void in the event of their death. Thus, when legatees are named or otherwise distinctly indicated, the bequest to them is said to be special, and regard must be had to the time at which it was made.

When a man bequeathes a third of his property to his *umm-ul-walad* being three in number, *and to fakîrs and miskîns* (beggars and indigent persons), the property will be divided into five shares, out of which three are given to the *umm-ul-walad*, one to the *fakîrs* and the remaining one to the *miskîns*. This is according to Abû Hanîfa and Abû Yusuf. Mohammed would divide the property into seven shares, and give three to the *umm-ul-walad*, and two each to the beggars and indigent. The former opinion is the one approved. Similarly, if a man should bequeath a third of his property to Zaid and the *miskîns*, Zaid takes half, and the latter take half according to Abû Hanîfa and Abû Yusuf.[1] When a person bequeathes one-third of his property to Zaid, the beggars and the indigent, according to Abu Hanîfa the property will be divided into three shares, according to Abû Yusuf into two moieties, and according to Mohammed into five shares, and this is the approved doctrine. When a person bequeathes a third to the poor, it may be expended, according to Abû Hanîfa and Abû Yusuf, on one poor person, but Mohammed holds that there must be at least two poor persons. But when a body of *miskîns* is indicated, the bequest cannot be expended on one only ; there is a general consensus on this point.

If a person were to be make a bequest for the poor of Balkh, it may lawfully be expended on other poor also, according to Abû Yusuf. And the *Fatwa* is on this.

When a person bequeathes a third of his property to one man, and then says to another, "I have made you a partner and joined you with him," the third belongs to them both. And if, after bequeathing to one man a hundred, and to another a hundred, he should say to a third, "I have made you a partner with them," the person addressed would be entitled to a third of each hundred.

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[1] *Radd-ul-Muhtâr*, Vol. V, pp. 662, 663 ; Mohammed would divide the property into three shares.

When a man makes a bequest to a stranger and *his* heir, the stranger takes half of the bequest, and the remainder is void, and in like manner if the bequest be to a homicide and a stranger.

If a person possessed of three garments of different qualities, one good, the other middling, and the third bad, bequeathes them to three different legatees, and one of the garments is then lost or destroyed, but which of them is not known, and the heirs refuse to make delivery of the remaining garments to any of the legatees, saying to each of them, 'the garment in which you had a right has been destroyed,' under these circumstances since the right of the parties is not defined, and the ignorance of this fact prevents validity of any judgment that may be pronounced in the matter, and the attainment of the testator's object, the bequests must be pronounced as void, unless the heirs will deliver up the remaining garments. If they should do so, the objection is removed, and the legatee of the best is entitled to two-thirds of the better of the remaining garments, the legatee of the middling garment is entitled to the remaining third of the better, and a third of the worse, while the legatee of the worst is entitled to the remaining two-thirds of the worst garment.

Any increment, such as the young of cattle or the produce of grain, arising out of the subject of a bequest before the death of the testator is the testator's property, and subject to the same liabilities as the rest of his estate. An increase that occurs after his death, and after the partition or distribution of his estate belongs to the legatee. An increase that occurs between these events or after the testator's death, but before partition, may occur either before or after the acceptance of the legacy by the legatee. In the former case, it is a legacy because it is an accessory to the original subject of bequest and must come out of the third of the estate, that is, is valid only if it falls within the third. But is it so in the latter case also, that is, when it occurs after acceptance and before partition? On this point Mohammed has not left any express *dictum*, but Kudûri has related that in this case the increase is not a legacy and comes out of the whole of the property. 'Our' Shaikhs, however, have said that it is a legacy and must come out of the third.

When a separable accession to the subject of a bequest takes place after the death of the testator, if the original subject and the

accession both come out of the third, they belong to the legatee. If they exceed the third, effect is to be given to the legacy, in the first place as against the original subject, and then as against the accession according to Abû Hanîfa, but against both *equally* according to the two Disciples, *e.g.*, if the testator has left six hundred dirhems and a mare, of the value of three hundred dirhems, which after the testator's death but before the partition of his estate, foals, the young animal is also valued at three hundred dirhems. Under such circumstances (the principal and accessory bequests amounting together to six hundred dirhems), the legatee is entitled to the mare and one-third of the foal (making together four hundred dirhems or a third of the whole) according to Abû Hanîfa, while according to the two Disciples, the legatee is entitled to two-thirds of each. This is on the assumption that the mare foals before the acceptance by the legatee of the original bequest, as well as before partition. If the mare foals after the legatee has accepted the bequest and after partition, it belongs to him; but if after acceptance but before partition, Kudûri holds that it is not a bequest, while 'our' Shaikhs have held that it is a bequest, and is to be regarded as coming out of the third in the same way as if the mare had foaled before acceptance. If it takes place before the death of the testator, the foal never comes within the bequest, but is subject to the same rules as the rest of the deceased's property.

Shiah doctrines.

According to the Shiah Law, "if a person should make a bequest of half of his property, and the heirs at first should assent, but afterwards declare that they thought the amount to be trifling, decree is to be given against them for the amount which they insist that they thought the legacy to be, and they are to be put upon their oaths as to the excess, but this is subject to some doubt. And if the bequest were of a slave or a mansion, and the heirs after first assenting to it should then allege that they thought it was no more than a third of the deceased's estate, or if more, only so in a trifling degree, such claim or allegation on their part cannot be attended to, because their consent in this case involves a known object of the value of which they cannot pretend ignorance at the time of assenting to the bequest. If a person should bequeath a third of his property by way of *mushaâ* or undividedly, the legatee is entitled to a third of everything of which he died possessed. If, again, he bequeathes a specific article which is of

the value of a third of his estate, the legatee becomes by his death the sole proprietor of the article bequeathed, nor have the heirs any ground of objection thereto. And if the deceased should have left both present and absent effects, (such as ready-money and debts for example,) so much of the specific thing must be surrendered to the legatee as a third of the property presently available will admit of, while he will have to wait for the remainder of it until it is recovered by the heirs, since what is not forthcoming is liable to loss or destruction and may never be realised. Consequently, if the bequest were of a third of his slave, two-thirds of whom prove to be the property of other parties, effect is to be given to the bequest over the whole of that third which belonged to the testator, and it is not restricted to a third of the third, because effect can be given to the will without encroachment on the rights of the heirs, that is, assuming that the rest of the testator's property is equivalent in value to two-thirds of the slave."

Specific legacies.

Two bequests, one repugnant to the other.

"When a person has made a bequest, and then another which is repugnant to it, effect must be given to the latter."

"When a person has said, 'if there be a male in the womb of this woman, he is to have two dirhems, and if there be a female she is to have one dirhem' and the mother is delivered of both a male and a female they are to have three dirhems; but should he have said, 'if what is in her womb be a male he is to have so-and-so, and if a female so-and-so' and the woman is delivered of both a male and a female they are not to have anything."[1]

Usufructuary wills. (Shiah doctrines continued.)

"If a person should bequeath the service of his slave, the fruit of his garden, the residence of his house or anything else of a usufructuary nature for ever, or for a fixed time, the advantage or profit to arise therefrom must be valued and should it not exceed a third of the testator's estate the bequest is valid, while if more than a third the legatee is to have as much as the third will cover, and the legacy is void as to the excess."

"When a person has bequeathed the service of his slave for a fixed period, the expense of the slave's maintenance must be defrayed by his heirs; as this is a duty which follows, or is dependent on the ownership of the slave, and the legatee is entitled to no more than the service of the slave, while all the other rights of ownership

[1] *Sharáya*

appertain to the heirs, as sale, manumission and the like, none of which, however, has the effect of invalidating the rights of the legatee."

"In all cases where a testator may have employed a term which is common or equally applicable to several things, the heirs have an option to fix on whichever of the things they please and give it to the legatee. If, again, the testator should say, 'give him my bow' and only one is found in his possession, that one must be given to the legatee of whatsoever description it may be."

Bequest of a portion of an heir.

"When a person has bequeathed to a stranger the like of his son's portion having only one child, this is in fact a partition of his estate between them, and the legatee is entitled to a half of it unless the heir refuses his consent to the full bequest, in which case the legatee's interest is reduced to a third. If, again, the testator has two sons, the legacy is a third of the estate, and if three, it is a fourth. The general rule is that the legatee should be added to the other heirs and treated as one of them, if they are all entitled to share equally in the inheritance; while if their shares differ, the shares of some being more and of others less, he ranks with the weakest of them or the one whose share is the least, unless the testator has expressly said that his share is to be equal to that of the highest, in which case effect must be given to the terms of the bequest. Further, if the testator should have said like the share of my daughter, the legatee according to 'us' is entitled to a half when there is no other heir besides the daughter, but his share is reduced to a third if she refuses her consent to the full legacy, because according to our doctrine daughters inherit the whole estate to the exclusion of the *asabâh* or agnates and the legatee thus becomes like a third daughter."

"If a person having three half-sisters by the mother and three half-brothers by the father, should bequeath to a stranger the like of the portion of one of his heirs, the legatee is to be treated as one of the sisters, and so to receive one share out of ten parts into which the estate must be divided, while the half-sisters take three and the half-brothers the remaining six conformably to the rules of intestate succession. If, again, the testator having a wife and daughter bequeathes the like of the share of the daughter and the heirs assent, the legatee is entitled to seven parts of the estate, the daughter to as many, and the wife to two, the whole being divisible

in such a case into sixteen portions. Nevertheless it would be more proper to say in this case that the wife is entitled to no more than one part out of fifteen, that being the number of shares into which the estate should be divided. If, again, a person having four wives and a daughter should say, 'like the share of one of them,' the division of the estate would be into thirty-two portions, whereof an eighth or four shares would be equally divided among the wives, the legatee would take one share like one of them and the remaining twenty-seven would pass to the daughter."

"If a person should bequeath to a stranger 'the portion of his child,' the bequest according to some is void, because it is a bequest of what belongs to another, but it is more agreeable in principle to say that the bequest is valid and should be construed in the same way as if it were the *like* to his share.[1] If, again, the testator having a son who afterwards becomes his murderer should bequeath the like to his share, here though some say that the bequest is invalid, yet it is more in conformity with the principles of law to say that it is invalid."

"When a person has bequeathed the double of his child's portion, the legatee has two equivalents of the portion and if he were to say *zuafan* (in the dual) or two doubles of it, the legatee would have an equivalent to four portions, but only to three according to some whose opinion is preferred as being more certain; and the same is the law when the testator has used the expression *zuaf-i-zuaf* or double of the double of his portion."

"When a person whose property is scattered about in different places has bequeathed a third of it to the poor, it is lawful to apply whatever is found in the city to the poor of the place, and even the whole of it many be lawfully expended on the poor of the testator's city and on those of them who are on the spot, without following or searching for any who are absent. According to the best authority, the number of those who are to share in the gift must, however, be three or more by reason of the testator's expression being in the plural. In like manner, if he should say,—emancipate slaves (in the plural), it is incumbent on the executor to emancipate at least

[1] The *bequest* of a child's share to another is invalid under the Hanafi Law as being the testamentary gift of the right of another, *i. e.*, the child who can under no circumstance be excluded from inheritance.

three, unless a third of the testator's estate should fall short of the object."

"When a person has bequeathed a mansion which falls down and is levelled to the ground before the testator's death, the legacy is void because the name of mansion (*dâr*) is no longer applicable to it. But this is liable to doubt."

"When a testator has said, 'Give Zaid and the poor a certain sum,' Zaid, according to some doctors, is entitled to a half, but according to others only to a fourth. But the first doctrine is the best supported."[1]

In order to avoid the operation of the rule by which legacies over a third are reduced to the disposible quantity, recourse is usually had to the acknowledgment of a debt; but when the acknowledgment is made on a death-bed or is not founded upon a prior actual consideration, the law treats such acknowledgment also as a simple legacy subject to reduction. "If a person," says the *Hedâya*, "on his death-bed say to his heirs, 'I am indebted to Zaid and you must credit what he says,' in that case the claim of Zaid to any amount not exceeding a third of the estate must be admitted although the heirs should falsify it." The acknowledgment of a debt. (Hanafi Law)

[1] These principles of the Shiah Law have been given from the *Sharâya* illustrated from the *Jawâhir*. It will be noticed that throughout these doctrines, there are two divergent views running side by side. The Mohakkik, the author of the *Sharâya*, invariably states both the views, but gives the preference to those of his own school. The contrary views are those entertained by Shaikh Murtaza, Ibn Junaid, Mohammed Ibn Idris-ul-Hilli and Ibn Zuhra Halabi, (author of the *Ghunia*), who in most matters, are in advance of the patristic school of the Mohakkik. I have given these extracts from the *Sharâya*, in preference to clothing the old views in my own words. I have followed in the main Mr. Baillie's rendering, though I prefer for general accuracy M Querry's French version.

CHAPTER XX.

RULES RELATING TO WILLS BY NON-MOSLEMS.

THE rules with reference to the wills of the non-Moslem subjects of Mussulman sovereigns are thus stated in the *Alamgiri*:—

"The will of a *Zimmi* for secular purposes is valid, according to all opinions. Other than secular purposes are of four different kinds. *First*, there are purposes which are *kurbat* or a means of approach to Almighty God, both with them and with us, and bequests for such purposes are valid whether they be to a set of particular persons or not; *second*, there are purposes which are sinful both with them and with us, and bequests for these purposes are valid if they are to a set of particular persons and the bequest is a *gift without regard to the purposes*, but if the persons are not particularised the bequest is void; *third*, there are purposes which are *kurbat* with us but sinful with them, and a bequest for these purposes is valid if in favour of a set of particular persons and is a gift without regard to the purposes, while if the persons are not particularised, the bequest is void; *fourth*, there are purposes which are sinful with us, but *kurbat* with them and bequests for these are valid, according to Abû Hanîfa, whether the persons be particularised or not, but void according to the Disciples when the persons are not particularised. Thus when a *Zimmi*, being a Christian or a Jew, has directed by his will that slaves be purchased and emancipated on his account, whether with or without a specification of individuals, or that a third of his property be bestowed in charity on beggars and the indigent, or expended in lighting the Holy Shrine, or in making war against [infidel] Turks, the bequest is valid. And if a *Zimmi* should bequeath a third of his property to mourners and singers the bequest is valid if they are particularised and it is a gift to them, but if they are not particularised it is void. And if the

third is to be expended in sending a set of Mussulmans on pilgrimage, or building a *masjid* for Mussulmans, and the persons are particularised, the bequest is valid, and a gift, so that they may perform the pilgrimage and erect the buildings or not as they please, but if the persons are not specified, the bequest is void. If he bequeath a third of his property for the erection of a church or synagogue or bequeath his mansion to be converted into a church or synagogue, the bequest according to the Disciples is void, unless it is for a particular class of persons, when it is a gift to them ; but according to Abû Hanîfa it is valid under all circumstances. This, however, say 'our Shaikhs,' is only when the erection is in the villages not in towns, the bequest in the latter case being inoperative."

"When an alien, who is a *Mustâmin*, makes a bequest to a Moslem or a *Zimmi*, it is valid for the whole of his property, unless his heir had come into the *Dâr-ul-Islâm* or Mussulman territory with him, and in that case the bequest as to the excess over a third is dependent on the assent of the heir. But if he has no heir, it is valid as to the whole of his property in the same way as the will of a Moslem or *Zimmi* is valid in the like case. So, also, though he has an heir in the foreign country. If he has bequeathed only a part of his property, the remainder is to be given to his foreign heir. If a *Zimmi* bequeathes more than a third of his property or makes a bequest to one of his heirs, it is not valid as in the case of a similar bequest by a Moslem. But if he bequeath to a person of a different religion, it is valid as in the case of inheritance. If, however, the bequest is to an alien who is not a *Mustâmin* it is not valid."

So also in the *Hedâya* :—"If a Jew or a Christian, being in sound health, build a church or a synagogue and then die, such building is an inheritance according to all our doctors, because Abû Hanîfa holds an erection of this nature to be equivalent to a *wakf* or pious appropriation, which (agreeably to his tenets) is not absolute but descends to the heirs of the founder, and the two Disciples, on the other hand, hold all such erections to be sinful in their nature whence they are of no validity (as a public foundation), and therefore descend to the heirs in the same manner as any other of the founder's property. If a Jew or Christian will that, after his death, his house shall be converted into a church or

synagogue for a particular sect of people, the bequest is valid according to all our doctors, and takes effect to the extent of a third of the testator's property because a bequest has two different characters—the appointment of a successor and an actual endowment, and the testator is competent to do either of these.

"If a Jew or Christian will that 'his house be converted into a church or synagogue for a sect of people,' without specifying the particular sect, the bequest is valid according to Abû Hanîfa. According to the two Disciples, on the contrary, it is not valid, for a deed of that nature is in reality sinful, although it may appear pious to the testator; and a will for a sinful purpose is null because the execution of it would be a confirmation of sin. The argument of Abû Hanîfa is that the founding of churches or synagogues is held by these persons to be an act of piety, and as we are enjoined to leave them to the exercise of whatever may be agreeable to their faith, the bequest is therefore lawful in conformity with their belief."

"*Objection.*—What is the difference between the building a church or synagogue in the time of health and the bequeathing it by will that Abu Hanîfa should hold it inheritable in the former instance and not in the latter?"

"*Reply.*—The difference is this: that it is not the mere erecting (of the church, &c.) which extinguishes the builder's property, but the exclusive dedication of the building to the service of God, as in the case of mosques erected by Mussulmans; and as an infidel place of worship is not dedicated to God indisputably, it, therefore, still remains the property of the founder, and is consequently inheritable (in common with his other effects)—whereas a bequest, on the contrary, is used for the very purpose of destroying a right of property."

"The bequests of *Zimmis* are of four kinds:—(1.) Those made for purposes held pious in the belief but not in the belief of Mussulmans, such as the building a church or a synagogue (as already mentioned), or the slaughter of hogs to feed the poor of their sect, in which cases Abû Hanîfa holds the bequest to be valid in conformity with the faith of the testator, whereas the two Disciples deem it invalid as being sinful. (2.) Those made for purposes held pious with Mussulmans but not with *Zimmis*, such as the erection of a mosque, a pilgrimage to Mecca, or burning a lamp in a mosque,

in all of which instances the bequest is invalid in conformity with the belief of the testator according to all our doctors, unless, however, it be made in favour of some particular persons in which case it is valid—as under such circumstances it is an investiture, the mention of building a mosque or so forth being considered merely in the light of a counsel—(in other words, as if the testator had bequeathed his property to particular persons counselling them therewith to erect a mosque). (3.) Those made for a purpose held pious both by Mussulmans and *Zimmis*, such as burning a lamp in the holy temple (of Jerusalem), or waging war against infidel Tartars which are valid whether made in favour of specific persons or not. (4.) Those made for purposes not held pious either by *Zimmis* or Mussulmans, such as the support of singers, and dissolute women—which are invalid as being of a sinful tendency—unless, however, they be made in favour of particular persons and then they are valid."

"If a *Mustâmin* bequeath the whole of his property to a Mussulman or a *Zimmi*, it is valid, for a bequest of the whole of an estate is deemed illegal only as it affects the right of the testator's heirs, (whence it is that if they assent such bequest is valid); but the heirs of the *Mustâmin* are possessed of no cognisable rights, they being as it were dead, so far as relates to the Mussulman government, because of their being in a hostile country. Besides, the property of a *Mustâmin* is in security only in virtue of the protection he receives from the State, which protection he enjoys in his own right, not in right of his heirs."

"If a *Mustâmin* bequeath a part of his property the bequest is executed accordingly, and the remainder is transmitted to his heirs, notwithstanding they be residents in a hostile country such being the law with repect to *Mustâmins*."

"If a *Mustâmin* immediately before his death, emancipate his slave or make him a *mudâbbar* in the Mussulman territory, it is valid, and the slave is accordingly free, notwithstanding his value exceed a third of his master's estate, for a bequest beyond a third of the property is deemed illegal only as it affects the right of the testator's heirs, but a *Mustâmin's* heirs possess no cognisable right as was already mentioned."

"If a Mussulman or *Zimmi* make a will in favour of a *Mustâmin* it is valid, for a *Mustâmin* so long as he resides in a Mussulman

CHAPTER XXI.

WHAT MAY BE DEVISED.

ANYTHING, movable or immovable, over which the right of property may be exercised or which may form the subject of exchange or barter, or a fractional share thereof, or the usufruct of a thing, may be lawfully disposed by will.

Shiah Law.

The *Sharâya* says :—"A bequest may be either of the substance or the usufruct of a thing, but with regard to both, it is indispensable that they are such as can lawfully be possessed or enjoyed. Hence the bequest of wine, or of a hog, or of a noisy or common dog, or of anything from which no benefit can be derived is illegal and invalid. But the bequest of trained dogs used for hunting or catching of game or for domestic purposes, such as guarding houses and watching in corn-fields, is lawful."

A bequest remains valid and operative, though the subject-matter should undergo a change or improvement after the constitution of the will; unless the alteration is so substantial as to give rise to the presumption that the testator, in making such change or improvement, intended revocation.

In the same way, the legatee bears any loss or deterioration to which the property may have been subjected during the interval. Should any encumbrance have been created by the testator upon the property, the legatee will receive it subject to the same. Where a piece of land has been left to a person by *wasiat*, and subsequent thereto a building is erected upon it by the testator, the rule is that the land should, upon the decease of the testator, go to the legatee, and the house to the heir; both being co-proprietors with regard to their respective rights.

If the testator, instead of building on the land bequeathed by him, pulls down the existing structures, houses, sheds, &c., the

legatee will receive the land devoid of any erection. But if a building is bequeathed, and is pulled down subsequently by the testator, the legacy is not deemed, and the *wasiat* becomes annulled *ipso facto*.[1]

The legacy of even a lawful object is void, if it is made on condition that the legatee should commit an unlawful act, for example, that he should set fire to any building or kill somebody, or prevent a person from going on a pilgrimage. When any property forms the subject of a *huba*, to which operation has been given, it cannot be bequeathed.

A testator, as we have pointed out before, has the power to dispose by will not more than a third of the property belonging to him at the time of his death. This is an invariable rule fixed by the *Hadis*, and there is a general consensus of opinion on the point among the jurists of the various schools. The author of the *Multaka*, the *Hedâya* and the *Minhâj-ut-Talibîn* have laid down the principle in distinct terms, and the Mohakkik enunciates the rule as follows :—" Further legacies, whether of substance or of usufruct, are restricted to one-third of the testator's estate, and if the whole of his bequests should exceed that amount they are void as to the excess, unless allowed by the heirs. The third of a testator's property, and consequently the extent to which he may lawfully bequeath out of it, is determined by its state at the time of his death, and not by its state at the time of making the will. So that if a person, who was in good circumstances at the time of making his will, should be indigent at the time of his death, no regard is to be paid to his previous wealth in determining the amount of his valid bequests. In like manner, if he were poor at the time of making his will, and has become opulent at the time of his death, it is his latter condition, and not the former, that must determine the legal amount of his legacies."[2] Shiah Law

And these principles have been repeatedly affirmed by the Courts of Justice in this country. One difference, however, between the various schools is worthy of note. Under the Hanafi Law, when a man having no heirs, bequeathes his whole estate, the bequest is valid, and there is no need of assent on the part of the *baut-ul-mâl* or public treasury, though it is the *ultimus hæres*. Hanafi Law.

[1] *Sharâya.*

[2] *Ibid*, p 248.

According to the Mâliki and the Shâfeï doctrines there is no power of constituting a universal legatee. Under the Shiah Law the rule is the same.[1]

Construction of bequests.

When the bequest is of a specific sum of money and the testator leaves actual property and outstanding debts due to him, the legacy is to be paid immediately, if it do not exceed a third of his assets; but if it exceed a third, one-third is to be delivered to him, and as the debts come in he is entitled to take a third out of every payment until his legacy is paid in full.[2]

According to Abû Yusuf dirhems and dinars (*i.e.*, money in general) are *ain* [objects in specie].

When the testator leaves to another legacy of a thousand dirhems, and his property consists of cash and effects besides debts, the legatee is to get his thousand dirhems from the third of the assets; but if the third does not satisfy the legacy, a third of the debts as they are realised will be paid to the legatee, until the legacy is satisfied. According to Abû Yusuf, the *assets* would have reference to the cash left by the deceased and not to the household effects, apparel, or ornaments left by the deceased. So that the thousand dirhems will be paid out of the third of the dirhems and dinars left by him, and if that is not sufficient, out of the third of the debts as they are realised.[3]

When two legacies left to the same person.

Supposing the testator leaves two legacies to the same person, would both of them take effect? Khalîl ibn Ishâk says both legacies would take effect if they are composed of different things, provided they do not together exceed a third of the estate, but if they are not different either in quantity or number, the last legacy

Mâliki doctrine.

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[1] According to the Shiah doctrines, in no case is there an escheat to the *bait-ul mâl*. The *Jâmaa-ush-Shittât* declares "the idea of a *bait-ul-mâl* is abhorrent to us." (See the *Personal Law of the Mahommedans*, where I have discussed this subject very fully.)

According to the earlier Hanafi jurists, when a person died leaving a particular heir who took only a specific share, and was not entitled to the residue by right of return, such residue went to the *bait-ul-mâl*. If there was a general legatee he took the residue. But the tendency of modern jurists and the decisions of the Courts is to hold that whenever there is an heir, there is no right in the *bait-ul-mâl*. Consequently, if a person died leaving a widow and bequeathing half his estate to *S.*, the one-sixth which remained over after allotting the widow's share and the legacy, would be given to the widow.

[2] *Radd-ul-Muhtâr*, Vol. V, p. 660.

[3] *Ibid*, p 660.

will take effect. So also the *Fatâwa Alamgiri*:—"When a person has said, 'a sixth of my property to such an one,' and then says at the same or a different meeting, 'a third of my property to him,' and the heirs consent, he is entitled to a third of the property, that is, to no more than a third, though they consent, because the sixth is comprehended in the third, whether it precedes or follows. And if a person should say, 'a sixth of my property to such an one,' and then say at the same or another meeting, 'a sixth of my property to such an one,' he would have only one-sixth unless there is evidence that another sixth was intended."[1]

If a person were to bequeath a particular or determinate share of his estate and effects, reference would be made to what he leaves at his death, and not to his possession at the time of the bequest. But where a specific property or a determinate share thereof is bequeathed, *e.g.*, a third of the testator's flock, and the flock is destroyed before his death, the legacy falls to the ground. For, where the *wasiat* was respecting a particular share in a particular flock, the non-existence of that flock destroys the legacy, even though he may have acquired other flocks afterwards. But if he was not possessed of any flock at the time of the bequest, and subsequently acquired one, according to the approved doctrines, the legacy would take effect, for the legacy being demonstrative, effect should be given to it when the objects, from which the legacy should be paid, come into existence after the bequest.[2] If the testator were, however, to say, "my executors shall give to so-and-so a sheep out of my property," and there are no sheep belonging to the testator at the time of his death, the value of a sheep would be given to the legatee. But if he had said, "my executors shall give Zaid a sheep out of my flock," and he died without leaving any flock, the legacy would be void. This rule applies to all kinds of property.[3]

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[1] Comp the *Radd*, p 660

[2] *Ibid.*

[3] "When a man who bequeaths a third of his property has no property at the time of the bequest, the legatee is entitled to a third of whatever he may be possessed of at the time of his death But if the bequest be specific or of some particular kind of property, as a third of his flocks and they all perish before his death, the legacy is void insomuch that if he should afterwards become possessed of other flocks, or another specific thing of the same kind, the right of the legatee would not attach to the subsequent acquisition, yet if

It often happens, as pointed out already, that the testator, instead of leaving a legacy to a grandchild, simply provides by will that he should take a son's share in his inheritance. Supposing then the testator leaves a son as his only heir, and the son consents, the inheritance will be divided between him and the grandson equally; otherwise the legatee would take one-third and the son two-thirds. But if there be two sons, the assent of the sons is not necessary, and the property is divided in equal shares among the sons and the grandson. Similarly, if there be four sons and a grandson, and the testator leave a son's share to the grandson, he takes a fifth. If a testator leave a wife, two sons and a daughter, and a grandson by a predeceased son, and will that the grandson should take a son's share in his inheritance, the division would be made in the following way :—

Wife $=\frac{1}{8}$	Each son $=\frac{1}{4}$
Daughter $=\frac{1}{8}$	Grandson $=\frac{1}{4}$

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he had no flocks at the date of the bequest, but afterwards acquires them and then dies, the bequest is valid And if he should say 'a sheep from my property' and have none, the value of a sheep must be given. If the bequest were only of a sheep without the addition of words referring it to his property, the bequest, according to some would be valid, while according to others it would be invalid. But if the expression were 'a sheep from my flocks' and the testator had no flocks, there is no doubt that the bequest would be void. And in like manner with regard to other kinds of property such as cows, camels and the like. When a person says, 'I have bequeathed to thee a sheep from my property,' the bequest is not confined to the sheep, that he may have at his death, but applies to the sheep, that may be among his property at his death, and since this is the case, if the testator should afterwards die leaving property comprehending sheep with other things, the heirs are at liberty to give one of the sheep or its value. There is nothing in the books as to the sheep being of the best, worst or medium quality, but according to a report of Hassan-bin-Ziâd, the Companions (of the Prophet) were of opinion that the heirs might in such a case either give a sheep of medium quality or its value. When a person says, 'My roan Turkish horse is a bequest to such an one,' these words are held to refer to a horse then in his possession, not to one which he may afterwards acquire. So also, if the expressions were 'my blind slave or my Sindian or Abyssinian slave'; while if the terms of the bequest were only 'my slave to such an one' or 'my Turkish horse to such an one' without further addition or qualification it would include his property at the time, and his subsequent acquisitions."

"When a person says, 'This cow for such an one,' according to Abû Nasr the heirs would have no right to give its value, but if it were bequeathed to the poor it would be lawful for them to bestow its value in charity"

If there had been only one son, the wife would have taken

	$=\frac{1}{12}$
Son	$=\frac{7}{12}$
Daughter	$=\frac{7}{24}$
Grandson	$=\frac{1}{12}$
Total	$=\frac{24}{24}=1.$

We have seen, already, that when there are several legacies, all of the same degree of importance, which, together exceed a third, according to the Sunni Law, all of them suffer a proportionate abatement. This is a general rule, subject, however, to the exception that when the bequests are for the accomplishment of religious duties or pious purposes, they must be given effect to in their entirety in the following order :— Sunni Law.

(1) for purification ;

(2) for prayers ;

(3) for alms ;

(4) for fasting ; and

(5) for pilgrimage.

This exception applies equally to works of a religious and pious character, though not of the same degree of importance as the fundamental religious practices. These works have to be carried into effect before the payment of legacies to individuals, and they are classified as follows :—

(1) Ransoming of prisoners.

(2) Emancipation of slaves to whom freedom has been promised by the testator.

(3) The payment of the dower due to the woman whom the testator marries in his last illness and consummates the marriage.

(4) The payment of the *zakât*.

(5) The payment of the *zakât-ul-fitr* and *uzzha* (Id and Bairam festivals).

(6) The expiation for *zihâr*.

(7) The expiation due for a vow.

(8) Expiation due for the non-observance of the obligatory fast.

(9) Emancipation of slaves.

(10) Performance of the non-obligatory pilgrimage.

The *Radd-ul-Muhtâr* has the following on this subject:—It should be remembered that bequests are necessarily of two kinds, either entirely in favour of Almighty God, or for His servants, or for both jointly, and it is laid down that bequests in favour of Almighty God should have precedence over all others, for the legatee is One, but when the legatees are several, there is no precedence for one over the other. Therefore, when a bequest is for human beings, no legatee can be preferred over another. For example, if a person make a bequest of one-third to one person, and then to another, both bequests would take effect, unless it is distinctly specified that either of them has preference over the other, or where it is a *muhâbât* or emancipation. But when a bequest is in favour of Almighty God, if all the directions are (1) for the performance of that which is *farz* (absolutely obligatory duties) as *zakât* or *hajj*; (2) or for the performance of duties which are simply obligatory, such as the payment of expiations, fulfilment of vows, the *Fitr* alms; (3) or for the performance of *nafliat*, such as non-obligatory pilgrimage and alms to the poor,—then commencement should be made with that which the testator directed should be performed first; but if they are all mixed together, then commencement should be made with those which are absolutely obligatory, whether the testator mentioned them first or not; then with the *wâjibât*, the simply obligatory, and the third will be applied proportionately in fulfilment of the testator's last wishes..... Consequently, if a man were to say that a third of his property should be applied to defray the expenses of *hajj*, *zakât*, expiations and of Zaid. the third will be divided into four shares, Zaid will get one share and the remaining three shares will be applied to the three purposes respectively. But if the person for whom the legacy is intended is not specified such as the poor, there will not be a division into four shares for all belongs to God, and the most obligatory duties will be discharged first.[1] According to the Shiah Law

Shiah Law.

[1] See the *Fatâwa Alamgiri*, Vol VI, pp. 177-178, where also the question is fully discussed. "When the legacies have been added up," says the *Fatâwa Alamgiri*, "and the third of the estate is sufficient to meet them all, they are all to be paid out of it, whether they be bequests to Almighty God or to mankind By b quests to Almighty God are to be understood 'bequests of approach,' or which are the means of drawing nigh to Him, such as the obligatory *hajj* or pilgrimage to Mecca, the *zakât*, fasting, prayers, expiations, vows, *sadakat-ul-fitr* and *uzzha* non-obligatory *hajj* and fasts, the erection of masjid and the like

" when a person has bequeathed property for the performance of certain duties some of which were incumbent on the testator and

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And by bequests to mankind are to be understood, such as bequests to Zaid, Bakr and Khâlid. All the legacies are to be paid in like manner, when, though the third of the estate is sufficient to meet them, they are allowed by the heirs. If the third of the estate be insufficient to meet all the legacies and they are not allowed by the heirs, then it is to be considered whether they all be to Almighty God or all to mankind or some be of one class and some of the other. If they are all to Almighty God, then it is further to be considered either whether they are all *farâiz*, [that is, obligatory duties], or *wajibat*, [that is, things which though not actually obligatory are yet incumbent], or *nâwâfil* [which are voluntarily assumed obligations], or whether they are partly of one kind and partly of another. When they are all equally prescribed and appointed duties, beginning is to be made with that which the testator began with ; when the bequest is for *hajj* and *zakât*, a commencement is to be made with the former though it were verbally last. It has been said with regard to *hajj* and *zakât* that they both take precedence of expiations, and expiations take precedence of the *sadakat-ul-fitr* (or alms of the *fitr*) and these of sacrifices, though sacrifices are also *wâjib* [or necessary] according to us. With regard to the alms in question all are agreed that they are *wâjibât*, but whether sacrifices be so is a point that is still within the province of *ijtihâd* or juridical discussion and what all are agreed about is still stronger. Thus, also the alms of the *fitr* are preferred to expiation of the *fitr* in the month of Ramâzân. And it has been said that the former have also precedence of vows, and vows of sacrifices, and these of *nâwâfil* or voluntary obligations. In all this that has been said it is assumed that there are no legacies of emancipation to take effect at once during death-sickness and no emancipation dependent on death, which is *tadbîr*. If there be any such they have preference, for those emancipations do not admit of being revoked, and are therefore stronger and entitled to preference. A bequest of emancipation, if it be *wâjib* or necessary as an expiation, is like other expiations of which we have spoken already, but if they are not *wâjib*, their effect is like that of spontaneous bequests to the poor, the building of musjids, voluntary pilgrimage and the like."

" When the legacies are partly to Almighty God and partly to mankind, as for instance, to a class of persons, the portion of the latter is to be taken out of the third and to be divided among them without preference of any one over the others, and with regard to the portion of Almighty God it is to be applied first to *farâiz* next to *wâjibât* and then to *nâwâfil*. And if, with the legacies to Almighty God there is a legacy to one person in particular, each of the kinds of approach is to be treated as single. Thus, if one were to say, ' A third of my property in *hajj*, *zakât*, expiations and to Zaid,' the third would be divided into four portions—one for Zaid, one for *hajj*, one for *zakât*, and one for expiations."

" When all the legacies are to mankind, preference is to be given to the strongest, so that if there be among them an emancipation to take effect immediately, it is to have the precedence ; but if all are equal in strength, each is to rank for its amount against the third of the property without any regard to the order in which they may have been mentioned by the deceased."

others only discretionary, they are all to be carried into effect if a third of his estate be sufficient for the purpose." If the third be not sufficient and the heirs should refuse their consent, those duties that were incumbent on the testator must first be discharged out of the general mass of his estate and then the others out of a third of what remains, beginning with the first mentioned by the testator, and so on in order. If none of the duties are of an incumbent nature but merely optional, they can take effect only to the extent of a third of the estate, and are to be discharged beginning with the first mentioned by the testator, and so on in order until the third is exhausted.

CHAPTER XXII.
GENERAL PRINCIPLES.

SECTION I.

THE LEGAL EFFECT OF A WASIAT.

Wasiat is defined as the conferment of a right of property (*tamlîk*) in a specific thing or in a profit or advantage, to take effect after the death of the testator. "It is proper for a man to make a will when there is no right against him on the part of Almighty God, but it is an incumbent duty to do so when there is such a right, as for instance, when he has omitted to pay his *zakât* or to fast, or to perform the *hajj* or pilgrimage to Mecca, or to say the prescribed prayers."

Any expression which signifies the intention of the testator is sufficient for the purpose of constituting a bequest. Examples of this are given in detail in the *Fatâwa Alamgiri* :—[1]

"When a person has said, 'this my slave to such an one, and this my mansion to such an one,' without using the word bequest, and there is no mention of bequests nor of the words 'after my death,' the expressions constitute a gift both by analogy and on a favourable construction, and if possession be taken during the life of the donor the gift is valid, but if possession is not taken of it till after his death the gift is void. If a person should say, 'I have bequeathed that a third of my mansion be given to such an one after my death,' this is a bequest, and possession during the lifetime of the testator is unnecessary. So also when one, whether in sickness or in health, has said, 'if any event should happen to me, then such thing to such person' this is a legacy, death being understood by 'us', as the event alluded to. So also if he should say, 'to such an one a thousand dirhems from my third,' this would be

[1] *Fatâwa Alamgiri*, Vol. VI, p 145.

a bequest though no allusion is made to death. But if the words were 'to such an one from my property,' or 'from the half' or 'the fourth of my property,' they would be of no effect unless uttered in connection with bequests in which case they would constitute a legacy. When a person has said, 'if I die on this my journey, to such an one there is against me a debt of a thousand dirhems,' it is a bequest out of his third."

Shiah Law Ambiguous legacies.

Under the Shiah Law there are certain rules relative to ambiguous legacies, which are deserving of notice, though in their application they will need some modification in view of the different conditions of society prevailing in our times:—

"When a person has bequeathed a *juzz*, or part of his property, there are two traditions as to the proper interpretation of his words. Of these, the most authentic assigns a tenth of the testator's estate to the legatee; but according to the other, he should receive only a seventh of the third. If, again, he should bequeath a '*saham*,' or share, the proper interpretation is an eighth; while if it were a *shai*, or a thing, it should be interpreted as meaning a sixth."

"If a person should make a bequest for several purposes, of which the executor has forgotten one or more, he should dispose of it in some good or proper way, although some of our lawyers have expressed an opinion that it should fall back into the deceased's inheritance."

"If a person should bequeath a particular sword which is in a scabbard, the scabbard and mounting or ornaments are included in the bequest. In like manner, if a person should bequeath a box containing clothes, or a boat or vessel which has merchandise on board, or a bag containing linen, in all these cases, the things actually bequeathed, and the other things contained in them, are included in the legacy. Some jurists, however, hold another view, though it does not deserve much consideration."

"If a person should make a will excluding some of his children from their share in his succession, the exclusion is not valid. But whether his words are to be treated as entirely inoperative is a question on which there are two opinions. According to one of these, they are quite futile and of no efficacy whatever; but, according to the other, the same effect should be given to them as in the case of the bequest of the whole of a person's estate to a stranger, excluding his heirs, when the bequest is valid as far as a third of

his property, and the heirs have their legal portion the remaining two-thirds. The first opinion, however, appears to be better founded in law, though the other is supported by a tradition which is now rejected.

"If a person should make a bequest in terms so ambiguous that the law affords no interpretation of them, it must be left to the heir to explain them as he may think proper.

"It is preferable that legacies should be kept below a third of the testator's property, and consequently the bequest of a fourth is better than that of a third and of a fifth better than of a fourth.

"In cases of ambiguous legacies, like the preceding, if the legatee should demand any particular thing as being conveyed in the testator's meaning, the statement of the heir would be preferred. If the legatee should still insist upon it, the heir would be required to confirm his statement by his oath not otherwise."

SECTION II.

THE REVOCATION OF WILLS.

Revocation of wills.

A will is essentially revocable in its nature. It may be revoked at any time, even during the last illness of the testator.

Revocation may be either express or implied, made either directly or indirectly. It is express when the testator revokes the *wasiat* in express terms. It is implied or indirect when the testator indicates by his conduct or his subsequent acts that he does not intend to maintain the legacy.[1] "Every act the effect of which is to extinguish the proprietary right in any property, when committed by a testator in respect of the subject of a bequest, causes revocation; and in like manner every act of the testator which occasions an addition to the subject of a bequest, when it cannot be delivered without the addition, has the effect of revoking it; similarly, any disposition subsequently made to which operation is given has also that effect."[2]

The different modes in which revocation may be effected.

As regards the mode and capability of revocation, bequests are usually divided into four categories; the first can be revoked either in express terms or by implication, *i.e.*, by conduct. The second kind may be revoked only by express words. The third by conduct only; and the fourth cannot be revoked at all. The

[1] *Fatâwa Alamgiri*, Vol. VI, p 144 [2] *Radd-ul-Muhtâr*, Vol V, pp. 657, 658

first kind of bequests consists of specific legacies which can be revoked by an express declaration of the testator to that effect, or by his selling or transferring the subject of the bequest in such a manner as to place it beyond his power to cancel or reverse the transfer. The second kind of bequest is where the testator bequeathes a third or fourth share of his property to any person. In such a case, the legatee is entitled to that particular share in any property which might be left by the testator at the time of his death, and consequently unless a revocation of the bequest is made in express terms, the legacy will take effect. The third kind of bequest is qualified emancipation which can be withdrawn only by express conduct. The fourth kind of *wasiat*, which cannot be cancelled either expressly or impliedly, is absolute emancipation.

According to Abû Hanîfa, on whose opinion in this matter the *Fatwa* seems to be, a mere change in the shape of an article effected at the instance of the testator does not amount to a revocation. For example, if a person were to bequeath to another a piece of silver which he subsequently made into a ring, this is not a revocation of the bequest according to Abû Hanîfa, though according to Abû Yusuf and apparently Mohammed, it would be so. If a person should sell a specific thing which he had bequeathed and then repurchase it, or make a present of it and then revoke the gift, the bequest would continue valid. "The slaughter of a bequeathed sheep is the revocation of a bequest of it, but the washing of a bequeathed garment is not so." The mere denial of a bequest does not, according to Abû Yusuf, amount to a revocation, but Mohammed holds a different view. If the testator were to say the legacy left by him to *A* or *B* was void, it would have the effect of revoking the will though it would not be so, if he merely said it was unlawful (*harâm*) or usurious.

If a testator were to devise a specific thing to *A*, and afterwards to *B*, the subsequent devise does not necessarily avoid the first. If it appears from the phraseology used or otherwise, that the intention of the testator was to give the subject of the bequest to both legatees jointly, effect will be given to such intention.[1] But if it appears that the intention was to give the legacy to the second

[1] According to the *Alamgiri* the pledge of a slave already bequeathed amounts to a revocation; but this effect is restricted to the special kinds of property analogous to the property referred to here.

legatee by cancelling the first bequest, it would amount to revocation. The general rule, however, is that the last legacy takes effect.[1]

If the second legatee were dead at the time when the subsequent bequest was purported to be made, the first bequest would remain valid by reason of the second being void, while if the second person were living at the time when the bequest was made and should subsequently die before the testator, both legacies would be void, and the subject of the bequest would revert to the heirs of the testator.

Under the Hanafî Law the pledging of a property will not avoid the bequest,[2] for it does not extinguish the right of the proprietor in the subject of the pledge; the right of the testator to redeem would devolve on his death to the legatee; in other words, the legatee takes the devised property *cum onere*,[3] unless the testator whilst creating the mortgage, use terms expressly from which a distinct revocation of the previous devise may be clear.

If one should bequeath a mansion and then whitewash it or pull it down, that would not amount to a revocation, but if he were to plaster it over with earth, that would be a revocation if done "largely." If he should bequeath land and sow it with vegetables that would not be a revocation, while if he makes a vineyard of it or plants trees on it, the bequest would be revoked according to Kâzi Khân.

Similarly, under the Mâliki and Shâfeï Law, among the various acts by which a *wasiat* is indirectly revoked are the sale and gift of the subject of the bequest. Mâliki and Shâfeï doctrines.

The Mohakkik gives the Shiah principle in these terms:— Shiah Law.

"A *wasait* is an *akd jâiz* on the part of the testator whether it be [the bequest] of property or the nomination of a *wali*; and it

[1] This is different from the English Law when the legatee, unless a contrary intention appeared, was entitled to have the estate disencumbered out of the personal estate of the testator not specifically bequeathed.

[2] Sometimes the attempt to convey may have the effect of revoking a devise, though owing to some want of formality the conveyance itself may not take effect But where the conveyance is initially invalid, for example, when it has been executed by a person who was under an incapacity it will not act as a revocation.

[3] *Fatâwa Alamgiri*, Vol. VI, p. 143; Baillie, p. 628, *Radd-ul-Muhtâr*, Vol. V, p 647.

may be revoked during his lifetime either by express language or by any act which ignores or contradicts the *wasiat*. Thus, if the testator should sell the subject of the bequest, or by another will direct it to be sold, or should bestow it in gift putting the donee in possession of it, or should pledge it, every such act would amount to a revocation. In like manner, if he should make such a use of it that it could no longer be called by the same name; as for instance, if he had made a bequest of grain and afterwards ground it into flour or meal, or a bequest of flour or meal and then converted it into leaven or bread, this would be a revocation of the bequest. Further, if a person should bequeath a quantity of oil and afterwards mix it with some of a better quality, or of grain and then mix it with some of another species so as to remove the possibility of distinguishing and separating one from the other, that likewise would be equivalent to a retractation of the bequest. Whereas if he should make a bequest of bread and subsequently break it into crumbs there would be no revocation of the legacy."[1]

The acceptance of a legacy.

The validity of a *wasiat* is submitted to another formality, namely, the implied or express acceptance of the *wasiat* by the legatee. "The acceptance of a bequest," says the Mâliki lawyer, "is a necessary condition;" and the Hanafi jurist lays down that "in default of acceptance a *wasiat* is null." Similarly, under the Shiah Law the acceptance of the legatee is required to vest the legacy in him. But there is considerable divergence between the Shiah school on one side and the Hanafi on the other regarding the period when the acceptance should be made.

Shiah doctrines.

According to the Shiah doctrines, an acceptance *before* the death of the testator is lawful, though it is discretionary with the legatee. An acceptance *after* the testator's death is conclusive, even though it should be delayed for some time after the occurrence of that event, provided there was no rejection on the part of the legatee after the testator's decease and before acceptance. But when the rejection was during the lifetime of the testator, the legacy may still be accepted after his death, as such a rejection has no effect in law. But if rejected after his death without having been accepted, the legacy is cancelled. A *wasiat* would similarly be cancelled if

[1] *Sharâya*, p 247.

rejected by the legatee even though possession had been actually taken, provided there was no acceptance. Where there has been no possession, but the legacy is rejected after the testator's death as well as the legatee's prior acceptance, it is cancelled, according to some of the jurists, while others maintain that it is not, and this opinion is more approved. If, however, there has been both acceptance and possession, and the legacy is subsequently rejected, there is no doubt that the rejection is ineffectual and the legacy is not cancelled because the right of property has then become already established in the legatee.

If a legatee should reject part of a bequest and accept the remainder, such partial acceptance would be valid and his right established to that extent. If a legatee should die before acceptance, his heirs take his place and may accept the bequest.[1]

Hanafi doctrines.

According to the Hanafi Law, an acceptance before the death of the testator is of no effect. The bequest may be accepted either expressly or by implication. If the legatee died before expressing either rejection or acceptance of the bequest, his death becomes, and would be presumed to amount to, an acceptance and his heirs would inherit the legacy. There is this difference between testate and intestate succession,—that an heir enters upon the possession of inherited property without acceptance, but a legatee does not enter upon the possession of bequeathed property without acceptance. The acceptance of a bequest must be made *after* the death of the testator insomuch that if it be accepted or rejected during his life, either act is void and the rejector is still at liberty to accept after the testator's death.

The legal effect of a bequest is to confer on the legatee a new right of property in the same way as in the case of a gift, and the bequest becomes vested in him by acceptance, so that if he accept after the death of the testator his ownership of the thing bequeathed is established, whether he take possession of it or not ; and if he rejects the bequest it is cancelled. But when a bequest is made to a body of people such as the poor, or is in favour of a *general* religious or pious purpose, the acceptance of the legatee is presumed.

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[1] *Jawâhir-ul-Kalâm.*

Section III.

The Wasiat of Usufruct of Lands, Gardens, Houses, Trees, &c.[1]

As pointed out already, the Mahommedan Law distinctly recognises perpetuities. So long as commencement is made, in the case of a settlement or devise, with a life in being, it is not necessary that the persons who take the remainder should be in existence.

Accordingly, one may lawfully, bequeath to another, for a limited period or in perpetuity, the produce (*ghallat*)[2] of lands and gardens, the rent or occupancy of a house, the use of animals or trees, the service or earnings of a slave, &c.

If the term for which the bequest is made is indefinite, it will be regarded as made in perpetuity.[3]

The effect of such a bequest is to *detain* the subject thereof in the ownership of the testator's heirs and to give to the legatee only the right to take its profits, "in the same way as a person in whose favour a *wakf* has been made."

The bequest may be for a particular year, *e.g.*, the year of the Hegira 460. If the year is past at the time of the testator's death, the bequest is void. If a portion only of the year has expired, it will take effect with respect to the unexpired portion.

If the subject of the bequest falls within the third of the testator's estate, its usufruct will be given to the legatee, in accordance with the use thereof provided in the *wasiat*. For example, if the bequest is of the right of occupancy of a house, and the house falls within the disposible one-third, it will be made over to the legatee for use and occupation.[4] If the rents and profits of the house

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[1] The title of this Chapter in the *Futawa Alamgiri* (Vol. VI, 188), furnishes a sufficient indication to the scope of the provisions of the Arabian Law regarding the bequests of usufruct:

في الوصية بالسكنى وبالخدمة والثمرة وغلة العبيد وغلة البستان وغلة الأرض وظهر الدابة وغيرها

See also *Radd-ul-Muhtâr*, Vol. V, p. 678.

[2] *Radd-ul-Muhtâr*, Vol. V, p. 677. See also 4 Hed., Chap. V, Bk. II, p 527; the term *ghallat* is a generic expression and includes produce, rent, income, profits of all kinds, the service of slaves, &c.; *Jâmaa-ul-Lughât*.

[3] *Radd-ul-Muhtâr*, Vol. V, p. 679.

Similarly, if the *wasiat* is of the service of a slave, and the slave falls within the third, the slave will be made over to the legatee for the period fixed.

alone are bequeathed, the legatee will get the same, but will not be entitled to occupy it. If the subject of the bequest exceeds the third, the legatee will get the benefit of that portion which is covered by the third. Where the bequest is of the use of some property which is in its nature impartible, the legatee will have the right to its service or use for one period and the heirs for double that period. The example given in the *Fatâwa Alamgiri* of a slave explains this principle thoroughly :—

"If the slave does not come within a third of the property he is to serve the legatee for one day and the heirs for two days alternately, until the completion of the year, and when it has been completed he is finally to be delivered up to the heirs. If one year in particular be specified, and the slave falls within a third of the property, or the legacy is allowed by the heirs, he is to be delivered up to the legatee to serve him for a whole year and then to be restored to the heirs. If he does not come within a third of the property, and the legacy is not allowed by the heirs, the slave is to serve the legatee for one day and the heirs for two days alternately for three years, and when the three years have passed the bequest is fulfilled by the service. If the legatee should die, the slave reverts to the heirs of the testator, and if he die in the testator's lifetime the bequest is void."

If the legatee should die before the expiration of the term limited for the bequest, the subject of the legacy would immediately revert to the heirs of the testator. If the legatee dies during the lifetime of the testator the bequest at once falls to the ground. The testator may bequeath the usufruct of a thing to one person and the corpus to another; and if the subject of the bequest falls within the disposible third, each legatee is entitled to his particular bequest. And if the bequest of the usufruct is absolute, the legatee is entitled to hold possession of the subject till his death, after which it is to be transferred to the legatee of the corpus if he be alive; if not, it is to be tranferred to the heirs of the testator.[1]

When the bequest is of the rents and profits of a house, and the legatee wishes to occupy it himself he cannot lawfully do so.[2]

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[1] *Radd-ul-Muhtâr*, Vol. V, p. 679.

[2] *Ibid.* According to Allâmah Sharnibilalieh, there seems to be some difference of opinion on this point, and he himself upholds its validity

"If the bequest be of the occupancy of a mansion and there is no property besides, the legatee may occupy a third of the mansion and the heirs have no right to sell the two-thirds of the mansion in their possession.[1] Neither is the legatee of the occupancy of a house entitled to let it,[2] nor to remove the slave whose services are bequeathed from the testator's place of residence to another, unless the legatee and his family (*ahl*) are in the latter place when the slave may be taken there for the purpose of serving them."[3] The reason of this decision is, that the bequest must take effect and be executed in conformity with the intent of the testator, and in a case where the family of the legatee reside in the same place with the testator, his intention is that the legatee shall avail himself of the service in that place, but where the legatee resides in a different city, the testator's intention must be presumed to be that the legatee should have the slave's services there.

When the occupancy of a house is bequeathed to a person without any limit of time, he is entitled to it as long as he lives. And when the income is bequeathed, if the house falls within a third, though the income may exceed the same, still it would be valid. Similarly, with regard to the earnings of a slave, or the produce of the testator's garden or anything else. When a bequest is of a slave to serve the legatee until he can do without those services,—if the legatee is a child, the service is to continue till he is of age; if he is adult and poor the service is to continue until he is able to buy a slave to serve him; but if he is adult and rich the legacy is void.[4]

If a person leave one year's earnings of his slave or income of his house to another, and he have no other property except such house or slave, the legatee in that case receives one-third of a year's earnings or income, because such income, as being property, is

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[1] According to the *Zâhir-ur-Rawâyèt*, the heirs are not entitled to sell the two-thirds share allotted to them, for that would be prejudicing the interest of the usufructuary legatee. Abû Yusuf seems to think such sale lawful. The doctrine in the *Zâhir-ur-Rawâyèt* is more approved. "Besides," says the *Heddya*, "the legatee has a controlling power over the heirs with respect to their portions, so far as to restrain them from executing any deed which may injure his share."

[2] According to the Shâfeïs he is entitled to do so.

[3] *Radd*, Vol. V, p. 680.

[4] This is according to the *Alumgiri*.

capable of division. But the legatee cannot require the heirs to make a partition of the house in order that he may himself collect the rent of his own share (*viz.*, the third).

When the bequest is of the *produce* of the testator's garden, the legatee is entitled to the existing and the future produce. But when the bequest is of the fruit of his garden in perpetuity, the legatee is entitled to the fruit thereof until his death. But if the word *abad* or *for ever* is not used, and there is fruit in the garden on the day of the testator's death, the legatee is entitled to it to the extent or value of the disposible third, but he is not entitled to the future fruit, it being supposed that the intention of the testator was to give one set of fruit. But where there is no fruit in the garden on the day of the testator's death, the bequest takes effect on the fruit which comes into existence subsequent to the death of the testator but prior to that of the legatee.[1] When a bequest is of something which is an accretion to something else, the specific accretion in existence at the time of the testator's death will be given to the legatee, though the words "for ever" may have been used. This is different from the legacy of the rents and profits.[2]

If the legacy be of the third of the *income* of a house, according the Abû Yusuf, the heirs may partition the house, giving the legatee a third. If the third yields any income, the legatee gets it, while if it is not productive he has nothing. The heirs may also sell him their two-thirds, whether before or after the partition.

When the bequest is of the *produce* of a piece of land and there are no trees upon it and no other property besides, the land is to be let and a third of the rent given to the legatee. If there be palm or other trees on the land, a third of the produce is to be given to him and the land is not to be given out in *muzâribât*.[3]

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[1] *Fatâwa Alamgiri*, Vol. VI, p. 148; *Radd-ul-Muhtâr*, Vol. V, p. 681; *Hedâya*, Vol. VI, p. 527.

[2] The reason of this is explained in the *Radd-ul-Muhtâr*. In the *Alamgiri* the rule is stated thus —When a man has bequeathed to another the wool of his flock or their progeny or milk for ever and has then died, the legatee is entitled only to the wool that may be on their backs or the young that may be in their bellies, or the milk that may be in their udders—whether he say 'for ever or not.'

[3] *Muzâribât* here means an arrangement by which the cultivator and landlord divide the produce according to certain shares

When the bequest is of the produce of a garden, the legatee may purchase the garden from the heirs of the testator, but that would cancel the legacy. In like manner, if they satisfy him with something else, he may surrender his third of the produce and release them from it. So also the occupancy of a house or the service of a slave may be lawfully compounded for, though a sale to an outsider of these rights is not lawful.[1]

A bequest of the *income* of a house or the earnings of a slave to the poor generally is lawful, but a bequest of the *occupancy* of a house or of the service of a slave to the poor is not lawful unless the persons are particularised.

When a bequest is made of the principal and the accessory to two persons respectively in one and the same will, each legatee takes the legacy specifically given to him. For example, if the testator were to say, "I give this ring to so-and-so and the stone to so-and-so."

But when one of the declarations is separated from the other, though the effect is the same according to Abû Yusuf, according to Mohammed the legatee of the principal is exclusively entitled to the principal and the two legatees are partners in the accessory.

The following is important as showing how effect is to be given to two legacies respecting the same article, one arising out of the other. "If a person should bequeath 'this slave to one and his service to another,' or this mansion to one and its occupancy to another,' 'or this sheep to one and its wool to another,' both persons being specified, each legatee takes what is bequeathed to him and there is no difference of opinion on this point, whether the bequests are made separately or together. But if a beginning is made in these cases with the accessory, and the principal is then bequeathed, as, for instance, if the service of the slave is first bequeathed to one person and then the slave to another, or the occupancy of a mansion to one person and the mansion itself to another, or the fruit to one and the tree to another, it is only when the bequests are made connectedly that each legatee is entitled to what has been named for him specially, for if they are mentioned separately, the legatee of the principal is exclusively entitled to the principal, and the accessory belongs to them both in halves. And if a mansion

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[1] *Radd-ul-Muhtâr*, Vol. V, p. 681.,

is bequeathed to one person and a particular apartment in it to another, the apartment is to both in equal shares. So, also, if a thousand dirhems are bequeathed to one person and a hundred out of them to another, the legatee of the thousand is entitled to nine hundred exclusively, and the hundred is to be equally divided between them and in this there is no difference of opinion."

When the bequest is of the use of the young of an animal which is unfit for service, the person in whom the right to the substance of the thing is vested is bound to maintain it. So, also, when the produce of palm-trees has been bequeathed to one person for ever, and the trees themselves, being yet immature, to another, the latter is liable for the expense of watering and tending them until they arrive at maturity and are in bearing, after which the liability is on the former, and when they have begun generally to bear, though they should subsequently fall off and produce nothing, the legatee of the produce would still be liable for the expense, in the same way as a legatee of service is liable for the maintenance, "both during night and day, though the slave sleeps and does no work during the night."

If twenty dirhems a year are bequeathed to a person from the produce of a garden, which is sometimes more productive and sometimes less, the legatee is entitled to have a third of the produce appropriated or set aside every year, and twenty dirhems out of it applied to his maintenance so long as he lives. Similarly, if a person were to declare that *A* should get a monthly sum for his support out of the testator's property, however small the allowance may be, a full third of the property must be appropriated or put aside that the legatee may obtain his monthly maintenance as directed by the testator.[1]

Rules relating to annuities.

If a testator should bequeath a third of his property to one person, five dirhems a month for maintenance to another so long as he lives, and five dirhems a month for the maintenance of a third person so long as he lives, and the heirs allow all the legacies,—the estate is to be divided, according to Abû Hanîfa, into nine parts, one of which is to be given to the legatee of the third, and the remaining eight to be appropriated for the other legatees, four parts each; but, according to Abû Yusuf and Mohammed, the property

[1] *Fatâwa Alamgiri*, Vol VI, p 150, *Radd-ul-Muhtâr*, Vol. V, p. 680

is to be divided into seven parts, whereof one is to be given to the legatee of the third, and the remaining six to be appropriated for the other legatees, three for each. This principle applies to those cases where the heirs allow all the legacies. But, now, suppose that they do not assent, in such case the division is to be into seven parts as before according to Abû Yusuf and Mohammed; but according to Abû Hanîfa, the case is to be treated as if all the legatees were equally entitled to the third, which is consequently to be divided into three parts among them. Under these circumstances, if both the annuitants should die before the fund is exhausted, the surplus is to revert to the legatee of the third; and if one of them should die, the surplus is to be divided and one share given to the legatee of the third and the other reserved for the survivor, according to Abû Hanîfa; while according to the Disciples only a fourth is to be given to the legatee of the third and three-fourths is to be reserved for the survivor. The views of the Disciples are adopted for the *Fatwa*.

If the testator should bequeath five dirhems a month for the maintenance of *A* so long as he shall live and ten dirhems a month for the maintenance of *B* and *C* so long as they shall live, (whether jointly or separately,) and the heirs allow the legacies, the property is to be divided into two equal shares, one-half to be reserved for *A* and the other half for *B* and *C*, for *A* is to be considered as a legatee of the whole, and *B* and *C* are to be considered together as one legatee of the whole, so that the property is to be divided between them in halves according to all opinions; and if *A* should die, what remains is to be reserved for *B* and *C* and ten dirhems a month applied to their maintenance, and if one of them should die before *A* the share set apart for them together would be applied for his surviving co-legatee and five dirhems would be given for the latter's maintenance every month. If the heirs do not allow the legacies, a third of the property is to be divided, by general consensus, into halves, one-half of the third being set apart for *A* and the other half for *B* and *C*. But if a person were to bequeath out of the third of his property a maintenance of four dirhems a month to *A* so long as he shall live, and a maintenance of ten dirhems a month to *B* and *C* so long as they shall live, and the heirs allow both legacies, one-third of the property is to be appropriated for *A* and another third for *B* and *C* jointly and on the death of *A*, the

third set apart for him, or so much thereof as is not exhausted, reverts to the heirs of the testator; and if either *B* or *C* should die, what remains of his share is to be reserved for his co-legatee, and when the other dies if anything should remain, it is to revert to the heirs. If the heirs do not allow the legacies, the third is to be divided into halves and one-half of it is to be reserved for *A* and the other half for *B* and *C*.

According to Mohammed, when a bequest is in the following terms, "I bequeath my third to be set apart for Zaid, that he may have four dirhems out of it for his maintenance every month so long as he lives, and I bequeath my two-thirds to Bakr and Amr that they two may have ten dirhems laid out for maintenance every month as long as they live," and the heirs allow the legacies, a full third of the property is to be delivered up to the first legatee in his absolute right, and the other two-thirds to be delivered to the two legatees between them in the same way, and when any of them dies, his portion goes to his heirs. But if the heirs do not allow the legacies, the first legatee is to have a half of the third, and the other two legatees to have the other half. Similarly, if the bequest were as follows, "I bequeath my third to Zaid that he may have four dirhems a month out of it for his maintenance, and I make a bequest to Bakr and Amr that Bakr may have five dirhems a month out of it for his maintenance, and Amr three dirhems a month for his maintenance," and the heirs allow the legacies, the first legatee is to take a third of the whole property, and the other two legatees to take another third between them in halves in absolute right; while if the heirs disallow the legacies, Zaid is to have half of the third, and Bakr and Amr to have the other half of it between them, and the share of whoever of them may die, goes to his *own* heirs.

Shiah Law.

According to the Shiah Law, if a person should bequeath the service of his slave, the fruit of his garden, the residence of his house or anything else of a usufructuary nature for ever or for a fixed time, the advantage or profit to arise therefrom must be valued, and should it not exceed a third of the testator's estate the bequest is valid, while if more than a third, the legatee is to have as much as the third will cover and the legacy is void as to the excess.

When a person has bequeathed the service of his slave for a fixed period, the expense of the slave's maintenance must be

defrayed by his heirs, as this is a duty which follows or is dependent on the ownership of the slave, and the legatee is entitled to no more than the service of the slave, while all the other rights of ownership appertain to the heirs, as sale, manumission and the like, none of which, however, has the effect of invalidating the rights of the legatee.

Noncupative wills valid.

A verbal will is valid according to all the schools and the mode of making it is indicated in the Koran, ch. V, vv. 105-107. The *Sharâya* declares that "wills or bequests are established in law by the testimony of two witnesses who are Moslems and just persons, or, in case of necessity, when two just Moslem witnesses are not to be had, by that of two *Zimmis* or infidel subjects. And in cases where property only is concerned, the testimony of one witness on oath may be received, or of one male witness and two females, and the testimony of even a single female witness may be received as establishing the right of a legatee to a fourth part of what she testifies to; of two women as supporting his claim to a half, of three as to three-fourths and of four as to the whole. But an appointment of executors or guardians by will can be established only by the testimony of two male witnesses, and in this case the testimony of women cannot be received, nor, further, according to the most obvious analogy, can that of one male witness on his oath be received, although with respect to the latter there is some difference of opinion."

"The testimony of an executor cannot be received in matters connected with his own executorship, nor as to anything from which he may derive advantage to himself or to his office. And if appointed executor for the expenditure of a specific part of his testator's property, his testimony cannot be received in favour of the deceased to prove that this property does not exceed a third of his estate." In Mahommedan countries, when a will is made in the presence of witnesses the usual rule is for these witnesses to embody their depositions on the will; subjoined is a copy of one of such depositions made in Algeria:—"We bear witness to God we were present when Salih-ibn-Rafah said to us, 'I take you as witness against my person that I bequeath to Zaid the third of my goods that I may have, the rest will be for my heirs.'" As said before, a bequest may be made by any form of expression or even by signs, which may serve to indicate the idea and intention of the

testator. In this country, however, *wasiats* are generally embodied in writing and attested by witnesses when they are called *wasiat-namahs*.

The Probate Act (Act V of 1881) applies now to the wills of Mahommedans and in the case of *Fatima Bibi* v. *Shaikh Esau*, West, J., held that since the passing of that Act, an executor of a Mahommedan will cannot claim to represent the estate of his testator, until he has taken out probate. But does this dictum apply where the will has not been reduced into writing ?

CHAPTER XXIII.

EXECUTORS.

SECTION I.

WHO MAY BE APPOINTED AS EXECUTORS.

THE testator has the power of confiding the execution of his last wishes to whomsoever he likes ; and subject to certain restrictions to which I shall presently call attention, the executorship may be entrusted to either a man or woman, a stranger or a relative. And though a testamentary disposition may be invalid, the appointment of the executor, so far as the guardianship of the minor children and their education are concerned, would be valid. The executor[1] is bound to carry out the wishes of the testator that are valid in law with the utmost fidelity,[2] to watch the interests of his children, and to administer to his estate and effects.

The appointment may be either limited to a special purpose or may be general.

A minor executor.

The appointment of an infant under the age of puberty or of an insane person, whether permanently so or with lucid intervals, is unlawful. But a woman, a blind person, or "one who has even undergone the specific punishment for slander," may lawfully be appointed an executor. When a minor has been appointed an executor, Khassâf has declared that the Kâzi should remove him and appoint in his stead, as executor, another person possessed of the capacity to administer to the testator and carry his wishes into effect. Any act committed by the minor executor before his removal would not be operative, according to the generally received doctrine.[3]

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[1] The executor is called a *wasi* or *musa-ilehi*.

[2] *Jâmaa-ush-Shittât ; Radd-ul-Muhtâr* and Kâzi Khân *in loco*.

[3] *Radd-ul-Muhtâr*, Vol. V, p. 689 ; *Fatâwa Alamgiri*, Vol. VI, p. 214.

Suppose, however, that the minor, before he has been removed by the Judge attains his majority, would he remain executor? Abû Hanîfa says not, but Abûl Kâsim has stated that he would continue to be the executor, and Mohammed and Abû Yusuf are agreed on this point.[1] A minor, though he cannot validly be appointed an executor by himself, can be associated with an adult in the office, but he cannot interfere in the administration of the estate until he has attained puberty.

Joint executors, one of whom is a minor.

When two persons are appointed executors, one of whom is a minor and the other adult, the adult executor, may act alone until the minor has arrived at puberty, but when that happens the adult executor can no longer act singly. If, however, the minor should die, or, on attaining to puberty, should prove to be of unsound judgment, the other may continue to act singly, and the Judge cannot in this case force an associate on him because there is still an executor to the deceased appointed by himself. Further, whatever may have been done by the adult executor during the minority of the other cannot be undone by the latter on his attaining puberty, unless contrary to the nature and object of the trust.

An alien infidel cannot be appointed executor.

The appointment of an executor being for the education of the testator's children, for the protection of their interests and the due execution of the testator's last wishes, the law jealously provides against the appointment of an alien (infidel) as executor.[2] According to all the schools, a Moslem cannot appoint a *harbi*, an infidel subject of a hostile power, to be his executor whether such non-Moslem, be a *Mustâmin* or not. Such an appointment, if made, is liable to be cancelled by the Kâzi. The appointment of a *Zimmi*, a non-Moslem fellow-subject, is lawful, but the Kâzi *may* set it aside. It follows, therefore, that the appointment of a non-Moslem alien is void *ab initio*, whilst the appointment of a *Zimmi* is valid unless set aside by the Judge. And this was the view enunciated by the Law Officers in two cases decided by the Sudder Court in 1825.

Mohammed Amin-uddin and another v. *Mohammed Kubir-uddin.*

In *Mohammed Amin-uddin and another* v. *Mohammed Kubir-uddin*, (the first of these cases,) a Mussulman female had bequeathed

[1] *Radd-ul-Muhtâr*, Vol. V, p. 687.

[2] "Because he is an enemy;" *Radd-ul-Muhtâr* "An infidel cannot be lawfully appointed executor to a Moslem even though he be his relation by blood, but an infidel may be the executor to one like himself:" *Alamgiri*, Vol. VI, p. 214.

the whole of her property to a stranger and had appointed a Hindu as the executor to her will.

Upon reference by the Judges of the Sudder Court to the *Kâzi-ul-Kuzât* and the *muftis* of the Court, they pronounced, (*a*) if the testatrix left no heirs she was at liberty to bequeath the whole of her property; (*b*) if she had heirs, the bequest of more than one-third would depend on the consent of such heirs; and (*c*) though the appointment of other than a Moslem as executor to the will of a Moslem is lawful, yet it is incumbent on the Kâzi to eject him from being executor. "The reason why the appointment," added the Law Officers "though not perfectly correct is said to be legal is because his official acts are valid until he be ejected by the Kâzi. The appointment does not affect the validity of the will so far as relates to the right of the legatee."[1]

Henry Imlach and another v. *Mussumaut Zuhurunnissa Khanum.*

The other case, *Henry Imlach and another* v. *Mussumaut Zuhurunnissa Khanum*,[2] reiterates the same principle. The Kâzi is vested with this discretion, from an apprehension that a non-Moslem executor may interfere with the religion of his testator's children. That reason does not, however, seem to hold good under the present conditions of society. And therefore when a testator has expressly appointed a non-Moslem as his executor, a Judge would hardly be justified in removing him and placing in his stead a Moslem. Of course, if the executor endeavours to tamper with the religion of his wards or educate them improperly, and against the directions of the testator, the Judge will be bound to remove him. Until such removal, whether owing to such conduct, or because it is expedient he should be removed, his appointment remains valid and his administration is effectual.

A Moslem husband married to a *Kitâbi* wife (*i.e.*, following one of the revealed religions), may lawfully appoint her his executrix and the guardian of her children.[3]

If an executor labouring under the incapacity of difference of creed or minority or slavery attains, by conversion to Islâm, or emancipation, or by coming of age, the capacity required by law

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[1] Sel Rep. IV, pp. 49-55.

[2] Sel. Rep., IV, p. 301.

[3] But though the appointment of a non-Moslem executor is valid unless set aside by the Judge, and until then he is the lawful guardian of the children of the testator, the Kâzi or Judge *cannot* appoint a non-Moslem as guardian to the children of a Moslem.

he would continue to be executor unless he has been removed already. But there is this difference between the acts of a minor-executor and those of a non-Moslem and a slave-executor that whilst the latter are valid, the former are absolutely invalid.[1]

When it appears to the Kâzi that the executor appointed by the testator is really unable to perform the work, or is weak and inefficient, he should appoint another administrator to act with or assist the executor; or, if the inability appears to be permanent, he may appoint another person in the place of the *wasi*, which would be tantamount to removing him from the office.

If the executor should represent himself unable to perform the work imposed on him, the Judge should not admit his representation without an inquiry to ascertain the fact; but should it appear that he is really incompetent, the Judge should appoint another in his stead. Some jurists have held, that if the Kâzi were to remove an executor appointed by the testator who was fit for his duties, such removal would take effect, though the Kâzi may have, in doing so, acted unjustly and be guilty of committing a sin. In the *Ashbâh*, however, it is stated that there is a conflict of opinion on this point among the jurisconsults. Many of them, as is stated in the *Sharh-Wahbânieh*, regard such an order of the Kâzi operative, but in the *Fusûlain* it is laid down that it is incumbent to hold such removal not to be valid, "though it is imperative [on the Judge] to remove the misfeasor and untrustworthy." The author then adds, "in the 27th section of the *Jâmaʻu-ul-Fusûlain* it is stated, that when the executor appointed by the deceased is a just man, it is not proper that he should be removed by the Kâzi; and if he does so, many jurisconsults have held that the removal will not take effect. In my opinion this is correct, for the testator is more bounteous to himself than the Judge, and the *Fatwa* should be in accordance with this view, for the Kâzis of the day are the cause of disputes." "All this relates to an executor appointed by the testator, for the Kâzi is entitled to remove an administrator appointed by him at any time, whenever he considers it expedient."[2]

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[1] *Radd-ul-Muhtâr*, Vol V, p 687.

[2] "When an executor is an *amîn* able to dispose of property, the Judge is not to remove him from office. So also when the heirs complain of an executor to the Judge, he ought not to remove him without malversation, but when that is established he should remove him."—*Alamgira*.

Shiah Law. The provisions of the Shiah Law regarding the qualifications requisite in an executor are analogous. It is requisite that an executor should be a person of understanding and a Moslem. Some jurists also require that he should be an *aâdil* or just person, because a *fâsik* (dishonest person) is unworthy of trust. Whilst others consider this qualification as unnecessary, because all Moslems are trustworthy and because the executor is appointed by the testator. But the Judge is bound to remove one who, though trustworthy at the time of his appointment, proved to be otherwise after the death of the testator; for his appointment must be considered as nullified, because the trust reposed in him by the testator was founded on a belief of his probity and would have been withdrawn on the confidence being found to be misplaced.[1]

It is not lawful to appoint another person's slave as an executor without the consent of the master. A person can lawfully appoint his own slave an executor, if his children are minors, but not if they are adults.[2] Where an executor becomes permanently insane the Kâzi should appoint another in his place. If no such appointment is made and the executor recovers his reason, he remains as such.

Section II.

Appointment of Executors, how made.

The executor is termed *wasi* and *musa-ilehi* and is defined to be an *amîn* or trustee appointed by the testator to superintend, protect and take care of his property and children after his death. He is also his *Kâim-mukâm* or personal representative.[3]

There are three kinds of executors:[4]—The first is a trustee who is capable of performing the duty which has been committed to him

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[1] *Sharîya*; p 253; Comp. the rules in the *Jâmaa-ush Shittât*.

[2] *Radd-ul-Muhtâr*, Vol. V, p. 687.

[3] "It is not advisable to accept the office of an executor, for it is a perilous matter on account of what Abû Yusuf is reported to have said—'To enter upon an executorship for the first time is a mistake, for the second a fraud, and for the third a theft;" *Fatâwa Alamgiri*, Vol. VI, p. 211; *Radd-ul-Muhtâr*, Vol. V, p. 685.

[4] There is considerable difference in the position of the *wasi* under the Mahommedan Law and that of an executor under the English Law. The *wasi* is the *locum tenens* of the testator for the management and preservation of the deceased's property, but the legal estate does not vest in him. Comp. the provisions of the Probate Act (Act V, of 1881).

and such an executor is fixed (*mukarrar*) and *cannot be removed by the Judge*.[1] The second is a trustee who is weak and incapable and to whom the Judge should appoint an assistant. The third is a *fâsik*,[2] an infidel or a slave, whom it is proper that the Judge should remove and appoint another in his stead. The word substitution implies that the appointment is valid in the first instance, for otherwise there could be no removal.[3]

As stated before, the testator may appoint any person, (subject to the exceptions already mentioned,) as his *wasi*, and the appointment will take effect upon the acceptance of the person so appointed. Such acceptance may be either by word or deed, *i.e.*, may be either express or implied, and may take place either in the testator's lifetime or after his death. Any dealing with the testator's property after his death amounts to acceptance.

The person appointed is entitled to renounce the executorship or to refuse to accept it, and if he does so, the appointment does not take effect. When the appointment and the refusal take place in the presence of the parties, there is no difficulty. But when an executor is appointed in his absence, and on being informed of the appointment after the testator's death, says, 'I do not accept,' but subsequently says, 'I accept,' the acceptance is lawful, "unless the Judge had removed him from office before he expressed his acceptance." But if he had expressed his refusal during the testator's lifetime, and should, after his death, desire to accept the office, the acceptance would not be valid. Though, if he were merely silent in the presence of the testator instead of saying, 'I do not accept,' and should subsequently, either in the lifetime or after the death of the testator, express acceptance it would be lawful, whether made in the presence of the Judge or not, unless the Judge had previously to his saying so removed him from office, when his subsequent acceptance would not be valid. If he should say in the absence of the testator, 'I do not accept,' and should communicate his refusal to him either by letter or messenger, and after this should say 'I accept,' the acceptance would not be valid.

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[1] See *ante*, p. 547.

[2] Untrustworthy person.

[3] *Radd-ul-Muhtâr*, Vol. V, p. 687.

After the appointment has once been accepted or properly dealt with, the executorship cannot be renounced.[1] But the executor can obtain his discharge from the Judge. Mohammed has laid down in the *Jâmaa-us-Saghîr* that when a person has been appointed an executor and has accepted the office in the testator's lifetime, the executorship is binding on the acceptor, so that if he should wish to withdraw from the office after the death of the testator, he is not at liberty to do so. But if he renounces in the lifetime of the testator and "before his face," the renunciation is valid, but if it is not made "before his face," it is not valid. What is meant by saying, "before his face" is with *his* knowledge, and "not before his face" is without his knowledge. This is according to the *Muhît*. If an executor should accept in the presence of his testator, and the testator should say when he is absent, 'take witness that I have discharged him from the executorship,' the discharge is valid.[2] But if an executor should reject his appointment in the testator's absence (after he has once accepted), the rejection according to the Hanafîs is void.[3]

Shiah Law. The provisions of the Shiah Law are analogous. It is declared that an executor may lawfully reject his office while the testator is alive, provided that he is duly informed of the rejection; but if the testator should die before the rejection or after it, without the information having reached him, no effect can be given to the rejection and it is incumbent on the executor to take upon him the duties of the office.

If an executor is incapable of discharging the duties of his office, the Judge may appoint an assistant to him, but if he is guilty of fraud he must be displaced and another appointed in his stead.[4]

An appointment of an executor may be made in any terms which indicate the intention on the part of the testator to make him his *locum tenens* or *Kâim-mukâm* after his death. If a person were

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[1] *Radd-ul-Muhtâr*, Vol. V, p. 686 It would seem, however, from what is stated in the *Ashbâh* that he may do so, if there is a provision to that effect in the will.

[2] *Alamgiri*, Vol. VI, pp. 211-212; *Radd-ul-Muhtâr* Nol. V, p. 686.

[3] "It would be a fraud on the testator to keep silent in his lifetime and then refuse." *Radd-ul-Muhtâr*.

[4] *Sharâya*, p. 252.

to say to another, "thou art my *wakîl* after my death," that would amount to the appointment of an executor.

In the *Fatâwa Kâzi Khân*, the *Khulâsa* and other works, it is stated that if a person were to say to another, "I consign to you my children after my death," or "take care of my children after my death," or use any similar expression by which authority is given to another to do certain acts on behalf of the testator after his death, it would create an executorship. Ulal-w'aljih, states that if a person were to say to some people, "do this for me after my death," that would constitute all of them as his executors. And if they all remain silent until after the death of the testator, when some of them only accept, these alone would be *wasis*. But if only one accepted, he will not be entitled to act as executor, until the Kâzi has associated another person with him in the administration of the testator's estate, for it was clearly the intention of the testator to confide the executorship to more than one person.[1]

An executor can be removed without his assent, and without his knowledge. This is different from the removal of an agent, who must be informed by his principal that he has been removed.

When a man has appointed two executors, one of them according to Abû Hanîfa and Mohammed cannot alone dispose of the property; and acts done by either of them singly are not operative without the sanction of the other, except in some special matters. Thus one may act separately as to the washing and shrouding of the deceased's body and its removal to the grave, the payment of debts out of assets of the same kind as the debts, the delivery of specific bequests, the restoration of deposits, or of things usurped by the deceased or acquired under defective sales, the manumission of a specific slave and the general preservation of his property. But they cannot act singly in taking possession of deposits belonging to him, nor in receiving payment of debts due to him, though they

[1] "A man addressing a number of persons says to them 'Do so after my death.' If they accept they all become executors, and if they remain silent till the testator's death and two or more of them accept, these become executors and may lawfully carry the will into execution. But if only one of them accepts though he is the executor he cannot lawfully carry the will into execution without bringing the matter before the Judge who may either appoint another to act with him or authorise him to act by himself." *Alamgiri*, Vol. VI, pp. 218-219.

may in suing for his rights. According to the same authorities, they may also act separately in accepting a gift for a minor, sanctioning his acts, making partition of things weighable or measurable, and selling what is liable to spoil. When the deceased has directed certain specified portions of his property to be bestowed in charity on beggars and indigent persons without particularising them, one executor cannot act separately from the other according to Abû Hanîfa and Mohammed, though he may do so according to Abu Yusuf, but if the objects of the charity are specified he may act alone according to them all. In what has been said it is supposed that the two executors have been appointed together at one and the same time, *lit.* in one sentence (*kalâm*). When one was appointed before the other, some of the Hanafî jurists hold that each of the executors may act separately, while others have declared that according to Abû Hanîfa and Mohammed they cannot act separately in any case in disposing of property, and this has been adopted by Sarakhsi. If, however, two executors are appointed with the express provision that either of them may act singly, or if the testator has declared that each of them is a complete executor (*wasi tâmm'*) each one of them may dispose of the property alone.[1]

When there are two executors, the acts of any of them are *bâtil* (void) [unless ratified by the other] like the acts of one of two *mutwallis*. The result is, that if one of them gives a lease of *wakf* lands, it would not be valid until consented to by the other, even though the executors may have been appointed separately. Some jurists, among them Abû'l Lais, have held that when the appointments are made separately, they can act separately; in the *Mabsût*, however, the first opinion is maintained as correct, and it is adopted by the *Durrar*. This is the case when the two executors are appointed by the deceased or by one and the same Judge; but if they have been appointed by two separate Kâzis, they can act separately, for as the Kâzis can act validly in their separate jurisdictions, the administrators as their *naibs* or delegates can also validly do so.

The ratification of the co-executor does not amount to a renewal of the contract, it only imparts the necessary validity which was

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[1] The above is from the *Alamgiri*. The passages in the *Radd* also deserve attention

originally wanting. If one *wasi* acts without the knowledge or the consent of the other, and any property is lost, the trustee or executor so acting will be liable to recoup the loss. One executor can appoint his co-executor his *wakîl* or delegate, in which case the acts of the co-executor by himself will be valid.

Abû Yusuf holds that each *mutwalli* can act singly. But Abû Hanîfa and Mohammed hold otherwise (whether the appointments are separately made or in one single act).

The latter opinion is generally acted upon.

The acts of one executor singly, like the acts of any one *mutwalli*, will not be *bâtil* respecting the purchase of shrouds for the testator, his funeral,[1] in the litigation of his rights,[2] in the purchase of necessaries for his children,[3] in the acceptance of gifts made to the testator, in the emancipation of specified slaves, in returning deposits (with the testator) and payment of specified legacies. In the *Sharh-Wahbânieh*, the following matters are included as being within the scope of an executor acting singly, *viz.*, he may lawfully return things acquired by the deceased by embezzlement, or under an invalid sale; partition things which can be measured or weighed (perishable commodities;) he may demand from the debtors of the deceased specified debts due to the testator, and pay the same.

When there are two executors, and one of them is absent, the other executor can validly act by himself, if the absentee is at such a distance that no *kâfila* or caravan can reach him.[4]

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[1] "This exception is founded on the reason of necessity, for delay in these matters would lead to the corpse decomposing. And for this reason neighbours are authorised to take charge of the funeral of a deceased; and fellow-travellers of a person dying on the road."—*Radd.*

[2] "Because several do not join in litigation and when they join, only one pleads."—*Durrar* of Mulla Khusru.

[3] "This is also founded on the reason of necessity, for otherwise the infants would suffer."

[4] Such an absence is technically called *ghîbat-i-munkata.* The rule is founded on the necessity of two executors acting in consultation When one is so far away or residing in such a place that no letter or news can either reach him or be received from him, the law regards him as non-existing for the time, and does away with the necessity of two executors acting together.

"Things deposited with the deceased can be returned by one executor, but the deposits of the deceased can be received by the two; this is the view of Saijani given in the *Hindyèh* (*Alamgiri*)."

A single executor may validly sell anything which it is feared may be lost. It has been already observed, that according to Abû Yusuf each executor can act validly in all matters, but Imân Abû Hanîfa and Mohammed differ. Where, however, the testator has declared by his will that the executors may act jointly or severally, each can act singly according to all jurists.

Shiah Law. The Shiah Law is slightly different, it says that when two persons have been appointed in general terms or with an express condition that they are to act jointly, one of them cannot act singly without the other, and if either of them should do so, his acts would not be lawful, except such as are positively incumbent or necessary, as for instance, the providing of clothes and food for the infant children of the testator. And it is held to be incumbent on the Judge to compel them to act jointly, and when that is impracticable he may appoint others in the stead of both. So when there are two executors, they can not apportion the property between themselves for the purpose of separate management. If one of them should fall ill or become incapable of performing the duties of the office, the Judge must appoint an associate to the other who is competent but this power cannot be exercised when one of them dies or becomes *disqualified*, for the remaining executor is empowered to act singly and the Judge has no authority while there is an executor of the deceased surviving and competent to act. If the testator has made it a condition that the executors are to act jointly and separately, in that case the acts of each singly are lawful. They may, also, lawfully divide the property between them and each take upon him the management of a part, in the same way as they might have acted separately before the partition.[1]

"This is the view of Ibn Shahna; but where something is to be sold in order to pay the legacy, it cannot be done without the consent of the co-executor."

"Kâzi Khân adds that one executor can lawfully take possession of any inheritance which might have devolved on the testator before his death, provided there is no debt attached to it; and of properties and deposits in the residence of the testator, to preserve them from loss or damage. He can also redeem pledges."

For example, to make a partition of such things with the partner of the testator.

Though one executor may not grant a receipt or discharge for a debt due to the deceased, yet he may validly make a demand for it and prefer a suit for the same.

In the *Hedâya* these principles are set forth with considerable distinctness and may be studied with advantage

Sharâya; the Mohakkik, however, thinks this view is open to doubt.

When two executors are appointed for two different purposes, *e.g.*, one for the payment of the testator's debts and the other for the administration of his estate, according to Abû Hanîfa and Abû Yusuf, both are general executors, competent to act in all matters; though Mohammed differs and holds that the authority of each is restricted to the purpose for which he is appointed. But where it is made an express condition that one executor shall not act in the matter to which the other is appointed, Mohammed-ibn-al Fazl states that, according to all opinions, the powers of each executor will be restricted within the limits laid down by the testator, and it is only where he has not made such a condition that there exists the difference of opinion above-mentioned, the *Fatwa* being with Abû Hanîfa and Abû Yusuf.[1] Hanafi Law; executors for a special purpose.

When one of two executors dies, appointing his co-executor as his own executor, in that case the surviving executor can act singly in respect of the original testator. If the deceased executor appoints another person as his executor, such person will become associated with the surviving executor of the original testator, who will not be entitled to act alone. Where the deceased executor has appointed no executor for himself, the Kâzi should associate another person with the surviving executor, for it was the intention of the testator that the execution of his will should be entrusted to two persons. This is stated in the *Durrar*.

If one of two executors becomes insane or otherwise incapable, the Kâzi shall appoint a substitute for him, but he cannot assign the executorship to the co-executor. But if one of them turns out to be dishonest, the Kâzi may either associate another person or authorise that other to act by himself.

The executor of an executor, however removed, can act as the executor of the first testator. Shâfeï differs on this point.

With reference to the powers of a derivative executor, the doctrine is put by the *Radd* in four aspects. (*a*) Either the deceased executor, whilst appointing an executor, leaves his powers regarding the estate of the original testator undefined, *e.g.*, he may only say, "I make this person the *wasi* after me;" (*b*) defines his powers, *e.g.*, says, "I make this person a *wasi* of my estate:" (*c*) or declares

[1] *Alamgiri*, Vol. VI, p. 215.

expressly "I make this person a *wasi* of the estate of my *musi* (testator);" (*d*) or says "of both estates."

When the powers are left undefined or it is expressly declared that he is to be the executor of both estates, the executor of the deceased executor will, according to the majority of jurisconsults, become the executor of the original testator. On this point Shâfeï and Zuffer differ.

Where it is simply declared that he is to be the executor of the estate of the deceased executor, there are two reports from Abû Hanîfa, the most approved being that he would be the executor of both estates. And there are two reports also from the Disciples, the most approved being that his powers will be restricted to the estate of his own testator. And if the deceased executor said, "I constitute this person executor of the original testator," it would be so. This is according to all the jurists. And so it is stated in the *Tâtâr-Khânièh*, *Sharh-i-Tahtâwi* and other works of authority.

In the *Fatâwa Alamgiri* the above principles are stated thus:— "When a man has appointed two executors and one of them dies the survivor cannot, according to Abû Hanîfa and Mohammed, dispose of the property, but should lay the matter before the Judge, who if he sees proper may make him sole executor and transfer to him the power of disposal, or add to him another in the place of the deceased. According to Abû Yusuf, however, the survivor can act alone, as in his opinion he was competent to do while the other was alive. Though one of the executors should accept after the death of the testator and the other should not accept, or though one of them should die before the testator and before acceptance by the other, the single executor is incompetent to act by himself according to Abû Hanîfa and Mohammed, while according to Abû Yusuf he is competent. If one of two executors is *fâsik*, the Judge may authorise the other to act singly or may join another with him instead of the *fâsik*, in which case the just one could not act without the other according to Abû Hanîfa and Mohammed, while according to Abû Yusuf he could. A person appoints two executors, one of whom dies, having first appointed his co-executor to be his executor, this is lawful and the co-executor may dispose of the property of the first deceased, for as he could have done so with the sanction of his co-executor in his lifetime, so

he can in like manner do so after his death. There is another report, however, against the legality of the disposal but the first is correct."

If a person should appoint an executor and direct him to act in conformity with the instructions of a third person, *e.g.*, "with the knowledge of so-and-so," the executor may act without that third person's knowledge. But if the direction was, "do not act without his instructions or knowledge," it would not be lawful for the executor to act without his knowledge, and the *Fatwa* is to that effect. If the testator should say, "Act in accordance with the opinion of so-and-so," or "Do not act except with the opinion of so-and-so," in the first case the person addressed would be the executor, in the second they are both executors according to the approved doctrine. Abû Nasr has said that if the words were, "Act in the matter with the orders of so-and-so," he is executor specially: while if the words were, "Do not act without his orders," both would be executors, and this seems probable according to the doctrine of "our" masters. When a man appoints one person his executor and another *mushrif* or inspector over him, the first is the executor not the *mushrif*, the effect of whose appointment is that the executor cannot act without his knowledge.

Shiah Law.

According to the Shiah doctrines, an executor cannot entrust the management of his testator's property to his own executor, *without the power having been reserved to him.* When an executor has his testator's authority for bequeathing the management of the estate at his own death, he may lawfully do so by general agreement. According to the approved doctrines he can also do so when the testator has neither authorised nor forbidden such appointment, though some jurists hold a different view. When there is no provision in the original testator's will the superintendence of his estate, upon the death of the executor, devolves upon the Judge. In like manner, if a person should die without appointing an executor, the superintendence and care of his estate belongs to the Judge. And if there is no Judge present on the spot, any true believer in whom confidence can be placed may lawfully assume the care and management of the estate, though there is doubt and difference of opinion on this point.

When there is an executor appointed by the testator, the Kâzi cannot appoint an administrator unless the executor is absent,

such absence amounting to a *ghîbat-i-munkata;* this is stated in the commentaries of Abû Saood.

If a person were to prefer a claim against the estate of the deceased and the executor is absent, the Kâzi will appoint a person as defendant to represent the testator. If the executor is present and consents to the debt, the Kâzi may at his discretion appoint another person to represent the testator, so that the plaintiff may properly prove his claim against him. For the acknowledgment of the *wasi* is not valid against the testator, and the plaintiff cannot recover a decree against the estate of the deceased by the mere consent of the executor.

Where the property of an infant child is managed by the father who wastes it, the Kâzi can take it away from his hands and place it in the hands of a curator to act as a *wasi*.

NOTE.

"If a man appoint two executors, neither of them is entitled, according to Abû Hanîfa and Mohammed, to act without the other, except in particular cases, of which an explanation shall be hereafter given. Abû Yusuf is of opinion that in all cases either of them may act without the other, because an executor is endowed with his power of action in virtue of the will of the testator; and as power of action is a thingsanctioned by the law, and incapable of division, he enjoys his power complete and perfect in the same manner as a complete authority to contract their infant sister in marriage appertains to each of her brothers respectively. (The ground of this is that executorship is a succession, which succession cannot be established in the executor, unless the authority of the testator devolves to him in the same degree in which it had appertained to the testator, that is, completely and perfectly) The testator's choice, moreover, of the two to be his executors is an argument of the particular attachment of each to his interest, which attachment is equivalent to the consanguinity of two brothers in the point of contracting their infant sister in marriage. The arguments of Abû Hanîfa in support of his opinion are twofold. First, the power of an executor being derived from the testator is of consequence to be exercised in the manner prescribed by him; and in the case in question the testator has entrusted this power to both the executors on the condition of their being united in the trust, for he does not expressly assent to their acting otherwise than jointly, and the above condition is moreover attended with advantage, as the deliberations of two persons are better than of one. It is otherwise with two brothers, in the circumstance of contracting their infant sister in marriage (as adduced by Abû Yusuf,) since the cause of such authority being vested in them is relationship, a

cause which exists equally in each. The contracting in marriage, moreover, is a right of the infant, resting upon her guardian, (insomuch that if the infant require her guardian to contract her to any person being her equal for whom she has a liking, he must comply,) whereas, in the case here considered, the acting (with the estate) is the right of the executor himself, not of another resting upon him. In the case of contracting the infant in marriage, therefore, if one of the two brothers so contract her, he merely discharges a duty incumbent on the other brother and his act is therefore valid, whereas in the case of executorship if one of the two act alone, he exercises a right appertaining to the other and his so doing is therefore invalid — in the same manner as where two persons owe a sum of money to one, in which case it would be perfectly lawful for either of them to discharge the whole debt, whereas supposing one man to owe a sum of money to two others, it would not be lawful for him to pay the whole to either of them."

"The cases excepted by Abû Hanîfa and Mohammed in which they hold the acts of either executor, singly, to be valid, are such as require immediate execution. Thus, it is lawful for either executor singly to disburse the funeral charges, as a delay in this might occasion the body to become offensive, whence it is that a similar power is vested in the neighbours. In the same manner either of the executors singly may purchase victuals or clothes for the infant children of the testator, this being a matter of urgency and which admits of no delay."

"So, likewise, it is lawful for either of the executors to restore an usurped article, or deposit a thing purchased by the testator under an invalid contract. In preserving the estate of the testator also, and in discharging his debts, the act of either executor is lawful independent of the other. For none of these are considered as an exercise of power but merely the performance of a duty, insomuch that the depositor has himself a right to seize and carry away his deposit, if he find it among the effects of the deceased, and the creditor has a similar right with regard to his debt, and it is moreover the duty of every one into whose hands property mayf all to attend to the preservation of it, whence this comes under the description of aid and assistance not of an exercise of power—neither do any of these acts require thought or consideration. Either of the executors has also a right singly to discharge a legacy or emancipate a slave, if directed by the testator, because such deeds require no thought or consideration."

"In the same manner, either of them may institute a suit in claim of the rights of the testator, because a conjunction of both in so doing would be impracticable, since, if they were to do it at one and the same time in the assembly of the Kâzi, they must occasion noise and confusion (whence it is that only one of two agents for litigation is allowed to plead at a time). The acceptance of a gift for an infant is likewise an act which either may perform singly, for in case of delay there is a possiblity of the gift being rendered null by the death of the donor previous to the seizure.

These acts, moreover, being permitted to a mother and nurse is a proof that they are not exertions of power. It is likewise permitted to any of the executors singly to sell goods where there is an apprehension of their spoiling as in the case of fruit and the like, and also to collect together and preserve the scattered property of the testator as a delay might occation the destruction of it, and such permission is, moreover, given to every person into whose hands property may fall whence it may be inferred that this is not an exertion of power. (It is recorded in the *Jâma Saghîr* that none of the executors, where there are more than one, has singly the power of selling goods or receiving payment of debts because these are exercises of power which they must perform jointly in conformity with the will and intention of the testator."

"If a person appoint two executors in a separate manner (as if he should first say to the one, 'I have appointed you my executor,' and again at a different period to the other, 'I have appointed you my executor,') some allege that in this case each of them has individually a power of exercising the functions of the appointment without consulting the other, in the same manner as two agents where they are appointed by different commissions — the reason of which is, that the testator, in appointing the two separately, indicates his assent to each acting from his own judgment without the other's assistance or advice. Others again say, that concerning this case a disagreement subsists between Abû Hanîfa and Mohammed on one side and Abû Yusuf on the other, because a will is not established until the death of the testator, and at that time both are executors together, notwithstanding they had been appointed separately. It is otherwise with two agents appointed under different commissions, for the appointment of each of those still continues distinct and separate as settled by the constituent."

"If one of two executors die, it is incumbent on the Kâzi to appoint another in his room. This is the opinion of Abû Hanîfa and Mohammed, because according to their doctrine the remaining executor has not of himself power to act on every occasion and the interest of the deceased therefore requires the appointment of another to operate with him, and it is also the opinion of Abû Yusuf, because, although the remaining executor be (according to him) empowered to act of himself, still it behoves the Kâzi to appoint another his companion, for the design of the testator evidently was to leave two successors, the management of his concerns, and as this may be fulfilled by the appointment of a substitute for him who dies, one must be appointed accordingly.—" *Hedâya*, IV, Bk. LII, Ch. VII, pp. 543-546.

Section III.

The Powers of the Executors.

The powers of an executor in the Mahommedan system are governed by rules closely analogous to those under the English Law. But there are points of difference which require careful attention.

When the heirs of the testator are minors, the powers of the executor are, within certain limits, absolute. In case of necessity, he has the power of selling the property and investing the proceeds, after discharging any debts of the testator or those incurred in the maintenance of his infant children, in other and more profitable kinds of property. The sale, however, must be for an adequate consideration, "such as is reasonable among people of business."[1] The executor cannot sell the property to himself or to any relative of his, whose evidence, under the Mahommedan Law, would be inadmissible against him.[2] He can enter into a partition with the co-sharers of the deceased or the legatee, in respect of the minor's shares in all kinds of property, both movable and immovable, "even with a slight inadequacy in the terms (*ghubn-i-yasir*)." A partition, however, where the inadequacy is manifest or glaring, *i.e.*, great, is ineffective.

When *all* the heirs are minors, the allotment by the executor of the legatee's share, and the retention by him of the residue for the heirs, is valid and effective. And in case any portion of their share is lost in the hands of the executor, the minors have no right to be recouped either by the legatee, or by the executor, unless it is occasioned by his wilful neglect or default. But when some of the heirs are adult and *absent*, the executor can lawfully enter into a partition on their behalf with the legatee in everything except *akâr or what is immovable*, and to hold the shares of the minors for them. If all the heirs are adult or some of them are *adult* and *present*, any partition made by him is void against those heirs who are adult, both with respect to moveable and immoveable property. But if the heirs, though *sui juris*, are *absent*, the partition effected by the executor is inoperative so far as the immovable property is concerned, in other words, if the heirs are adult but not present, a partition of movable property alone made by the executor with the legatee is valid.

When the testator has left specific bequests to individuals, a division of the property by the executor among the heirs, in the absence of the legatees, is not effective; and in case the share or shares allotted to the legatees should perish, they would

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[1] *Radd-ul-Muhtâr.* [2] *Ibid*, *Fatâwa Alamgiri*, Vol. VI, p 220.

be entitled to claim a share to the extent of a third of the estate from the shares given to the heirs.[1]

But when the partition is effected by the Judge, and the portion allotted by him to the legatee is held in his custody, the division is valid, and if the legatee's portion should perish in the hands of the Judge or the curator appointed by him, the legatee would have no right of recourse against the heirs, neither would the Judge be responsible.[2] "This rule applies, however, only to those things which can be *weighed or measured*—a partition of which is, in fact, a division. But with respect to things that are not so, a partition would in effect amount to a mutual exchange, like a sale, and, consequently, would be unlawful, for it is not lawful to sell another person's property."[3] "And when the Judge has appointed a guardian (*wasi*) for an orphan *in all things*,[4] and he has made a partition on his behalf, whether of movable or immovable things, the partition is lawful, but if the appointment is only for a special purpose, as for the maintenance of the orphan or the conservation of his property, the partition is not lawful."

The powers of a *wasi* appointed by the mother.

The powers of a *wasi* appointed by a mother or any other relation, such as the brother or uncle, are very limited. He has no authority to deal with the immovable property of his wards under any circumstance, nor with any property inherited by the minors from any person other than their mother. The *wasi* can deal with their movable property inherited from the mother, or on their behalf enter into a partition in respect thereof, provided the father be not alive, and there be no executor appointed by him.

When an executor makes a partition *among* the heirs, who are all minors,[5] the partition is unlawful. If they are all adults, but some of them are absent,[6] and a partition is made with those who are present and their shares separated from the mass, the partition

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[1] "The legatees can claim also against the executor, according to Zailye. All this when a partition is made without leave of the Kâzi."—*Radd*

[2] *Radd-ul-Muhtâr*, Vol. V, p. 692, *Alamgiri*, Vol. VI, p. 220.

[3] *Alamgiri*, Vol. VI, p. 220. [4] *i.e.*, with general powers.

[5] "An executor cannot make a partition of the shares of the minors among themselves."—*Radd.*

[6] "If the heirs are absent at three days' journey or more, this is according to Kahastâni." The distance must in every case be such that it is difficult to communicate without delay.

is lawful with respect to *chattels* (*mâl*) but not as regards immovable property.[1] If there are both minor and adult heirs, but the adult are absent, the partition is unlawful. If the adults are present and their share is given up to them and the shares of the minors separated from the shares of the adult heirs, and kept *in a mass without partition among the individual minors*, the division is lawful. When the share of each minor or adult is separated from the rest, the whole partition is invalid. But if the portion of the adults is surrendered to them, and the portion of the minors retained, and subsequently on their attaining majority, divided among them, the partition, as between the adults and the minors, is valid.

Power of sale possessed by the *wasi*.

When the testator has left a direction in the will empowering the executor to sell his property and invest the proceeds in any other kind of property, the executor can lawfully do so.

When the executor contracts a debt on behalf of the minor without any necessity therefor, it will not be operative against the minor, and if any loss accrues to the orphan therefrom the executor will be liable.

"When an executor appointed by the father sells anything belonging to the estate of the testator, the legality of his act will have to be considered in two aspects:—

"The *first* is, when the deceased has left neither debts nor legacies; the *second* is, when he has died either leaving debts or legacies. In 'the Book,'[2] it is laid down that even when there are no debts or legacies to be paid out of the estate of the testator, the executor may sell the whole property, movable and immovable, *when the heirs are minors*. But Shams-ul-aimma Halwâni has said, what is stated in 'the Book' was the opinion of the ancients, and that, according to the moderns, the *akâr* or immovable property of a minor can be sold only, when there are no debts nor general legacies, *if the minor has occasion for the price thereof*, or a purchaser is eager to obtain it by giving double its value, or the sale is otherwise to the minor's advantage, as for instance, when the *khirâj* or land-tax is to be paid, or when the expenses exceed its income, or the property being a shop or a mansion is falling into decay. With regard to the land-tax, when a necessity arises for paying it, and there is belonging to the estate any other property besides *akâr*, that property is first

[1] Kâzi Khân; *Alamgiri*, Vol. VI, p. 222. [2] *Mukhtasar-ul-Kudûri* is meant here.

to be applied towards its payment, and if that is not sufficient the *akâr may then be sold* for its proper value, or a price not much less than its value, but the executor cannot lawfully sell it at a greater depreciation than men would usually submit to. And, in like manner, an executor cannot lawfully purchase for a minor anything at a price much above its value."

In the *Radd-ul-Muhtâr* the principle is stated somewhat more explicitly :—"The ancients held that an executor could sell the immovable property of the minors according to his discretion, but modern jurists have imposed several restrictions on the power of sale possessed by the executor, in the case of immovable property belonging to his minor wards. These restrictions are specified in the *Fatâwa Kâzi Khân*, and Zailye declares that Sadr-ush-Shâhîd holds the *Fatwa* is according to the modern view. These restrictions are as follows :—(1) if the testator has died leaving debts, and it is necessary to sell a portion of the property to discharge such debts, *i.e.*, the debts cannot be paid off without selling some portion of the immovable property, he may lawfully do so for adequate value ; (2) if the testator has directed the payment of legacies in money and he has left no cash out of which such legacies can be paid, the executor can sell a portion of the immovable property sufficient to pay off such legacy ; (3) if there is a reasonable apprehension of the property being lost by decay or dilapidation, like a house falling into ruin, etc. ; (4) when the property is in the possession of an usurper, and there is no prospect of its being recovered ; (5) when the expenses connected with the management or preservation of the property exceed the income ; (6) when it is necessary to pay the royal taxes, and there are no funds wherewith to pay them ; (7) when the price offered for the property is double its real value."

The executor can lawfully sell to any person other than himself any movable property belonging to his minor wards or purchase for them any property from such persons, but it must be for the consideration usually current in transactions of that kind. If the sale or purchase is for an inadequate consideration, it is not valid and can be set aside, and the executor would be liable.

An administrator or guardian (*wasi*) appointed by the Kâzi cannot purchase anything belonging to his minor wards, nor can he sell to them anything belonging to himself ; but where a *wasi*

appointed by the father of the minors enters into such a transaction, it is valid, according to Abû Hanîfa, if it is to the *manifest* advantage of the minor. The Disciples hold the transaction to be absolutely invalid.[1]

According to some jurists, the father may sell his infant children's property, provided he is an *amîn* or a person worthy of trust, and the sale is to their *manifest* advantage. But where the father is an untrustworthy person, the minor, on attaining majority, can set aside the sale, unless it was for double the real value of the property, and the *Fatwa* is according to this doctrine. And Hamâwi has stated in his commentaries on the *Ashbâh*, that a father has no greater power than an executor, and his powers are subjected to the same restrictions; Hanouti has also passed *Fatwas* according to this view. All this applies to the sale of immovable property. With respect to movable property, the father [if *de facto* guardian] can sell an infant's goods for the current price, if it is to the advantage of the minor and even with a slight inadequacy, but such inadequacy must not in any case be great, otherwise the sale would be invalid.

"An executor," says the *Alamgiri*, "may give out the property of a minor in *muzâribat*, but he cannot lawfully give a long lease of part of the deceased's estate for the payment of debts, nor lend the property of a minor according to all reports, and if he should do so he would be responsible. *Neither is it competent to the Judge to lend the minor's property nor for a father to do so according to the correct doctrine.* If an executor or a father should pledge the property of an orphan for his own debt, the pledge ought not by analogy to be lawful, but it is said to be so on a liberal construction of law. But it is not lawful for the executor to pay his own debt with property of the orphan. If, however, a father should do so it would be lawful. And an executor may sell the orphan's property in exchange for his own debt to his creditor

[1] "When an executor sells the orphan's property to himself, or his own to the orphan, the sale is lawful according to Abû Hanîfa, and according to Abû Yusuf also by one report, when the sale is obviously for the benefit of the orphan though unlawful when not obviously for his benefit. According to Mohammed and Abû Yusuf by another and more probable report such a sale is unlawful under any circumstances."—*Alamgiri*, Vol. VI, p. 224.

according to Abû Hanîfa and Mohammed and the price becomes a set-off against his debt, *but he is responsible to the minor.*"

This opens up such a serious question regarding the power of a father, or an executor, to give in pledge the property of a minor, that I think it advisable to give here a translation from *Kâzi Khân*, on the authority of which the passage in question is founded. "The *wasi* is not entitled to lend out the property of the orphan; and if he does so, he would be liable. The Kâzi, however, has the authority to lend. With regard to the father, there is difference among the jurists..... *The correct doctrine is that the father is like the executor and not like the Kâzi.* If the executor borrows himself the property of the minor, it is not lawful and it will be a *dain* (debt) upon him. It is reported from Mohammed that, according to Abû Hanîfa, the *wasi* has no authority to borrow from the property of the minor; but Mohammed expresses a hope that if the *wasi* does so when he is able to repay, his act may not be reprehensible. If the *wasi* or father pledge the property of the minor for his (the *wasi's* or father's) own debt, according to *kyâs* (analogy), it would not be valid; but according to *istehsân* (a liberal construction) it would be valid. *And it is stated from Abû Yusuf that he has adopted the* (*doctrine of*) *kyâs.* If the *wasi* discharges his own personal debt from the property of the minor, it would not be valid; if the father does so, it would be valid, for the *wasi* has no power to buy the property of the minor for himself according to current price, but the father can lawfully make such a purchase. And pledge is like the payment of a debt; and [accordingly] the father may discharge his personal debt from the property of the minor, but it will not be lawful for the *wasi* to do so. And the same is the case with pledge. And in the *Jâmaa-u-Saghîr* it is stated, that when the father pledges the property of his minor child for his own debt, and the value of the property pledged is greater than the debt, and the property is lost or destroyed in the hands of the pledgee, the father will be liable for the amount of debt [which he has paid off] and not for the price of the article. But Shams-ul-aïmma Sarakhsi has held, that the father and *wasi* will be equally liable for the value of the property pledged. According to Abû Yusuf, as neither the father nor the *wasi* are entitled to pay their debts with the property of the minor, so they are not entitled to pledge his property for their

Abû Yusuf's rulse.

debts. *And Bashr ibn-i-Walid has stated that the father has no power to pledge the property of his child for his own personal debt.* It is generally accepted that according to [the letter of] the law the father or *wasi* can pledge ; but according to *kyâs* they cannot, and when the property pledged is lost or destroyed, they are both liable for its value.

"If the *wasi* of the deceased sells the estate for the payment of his debts, which do not cover the entire estate, according to Abû Hanîfa, the sale is lawful, but it is not so according to the Disciples. If there is no debt due from the inheritance, and the heirs are minors, and the Kâzi sells the entire estate, according to Abû Hanîfa, the sale would take effect. Abû Hanîfa, has drawn a distinction between the [powers of the] *wasi* of the deceased and of his father. The *wasi* has the power of selling the inheritance for paying the deceased's debts, and to give operation to his legacies. But the father of the deceased, that is, the grandfather of the minors, can sell the inheritance *for* his own son but he is not empowered to sell the estate for the payment of the debts due from the minor children on behalf of his son [*i.e.*, their father.][1]

Shams-ul-aïmma al-Halwâni states this as the doctrine laid down in Khassâf. But Mohammed has placed the grandfather in the position of the father. In "the Book" (*i.e.*, the *Mukhtasar-ul-Kudûri*), it is stated that when a person dies leaving a father and an executor, the executor is preferred to the father. If there is no executor, the father is preferred [for the administration of the deceased's estate] and so on in order, until the grandfather's executor, after whom comes the *wasi* appointed by the Kâzi. Shams-ul-aïmma al-Halwâni has stated that the *Fatwa* is according to the doctrine laid down by Khassâf.

"If the father of a minor who has inherited property, is a spendthrift and likely to commit waste, so as to be ..... liable to inhibition he is not entitled to the guardianship of his child's property."

Shams-ul-aïmma al-Halwâni has stated in his *Sharh* (gloss) on the *Adâb-ul-Kâzi* [of Abû Yusuf] that when a Kâzi appoints a *wasi* (guardian) for an orphan, the *wasi* so appointed will be like

[1] Kâzi Khân, Vol. IV, p. 436.

the *wasi* appointed by the father, if the Kâzi appointed him in a general manner in all matters. But if he has been appointed in any special matter, he will be a *wasi* for that matter alone. This is not the case with the *wasi* appointed by the father. . . . When the *wasi* appointed by the deceased is a just and qualified person (عدلا كافيا), it is not advisable for the Kâzi (لا ينبغي) to remove him, but if he is not 'just,' he should remove him and appoint another. And if he is just but is not thoroughly efficient (لو كان عدلا غير كاف), the Kâzi cannot remove him, but should join with him a competent administrator. If the Kâzi, however, removes him, he will be removed, and, similarly, if the Kâzi removes one who is both just and competent, it has the effect of removing him. So it has been stated by the Shaikh-ul-Imâm, known as Khâher-Zâdeh. But several jurists aver that the order of the Kâzi removing a just and competent *wasi* has no effect, for he derives his authority from the deceased, and, therefore, he is to be preferred to the *wasi* of the Kâzi. And Kudûri has stated that the Kâzi has no power to remove the *wasi* appointed by the deceased or join another with him, unless he has committed a breach of trust or is a *fâsik* so as to be known as a bad man, او كان فاسقا معروفا بالشر . In such a case the Kâzi can remove him and appoint another in his stead, or if he is a virtuous man but inefficient [in his work], the Kâzi can associate another person with him. So it is stated also in the *Asl* and its *Sharh* by Tâhawi. But it is not mentioned whether, if the Kâzi does remove a just and competent *wasi*, it will take effect or not.[1] Shaikh Imâm Abû Bakr Mohammed ibn-ul Fazl says that when the *wasi* is unable to carry out the dispositions of the testator, he ought to be removed." . . . . . .

"The *wasi* is empowered to do all acts from which benefit may accrue to the orphan, so is the father."

The executor cannot trade with the goods of the infant on his own account, but, according to the *Durrar*, he can do so for the orphan, if it is to the latter's advantage. If the executor should engage in trade with the property of his minor ward, the profits derived therefrom should, according to some jurists, be given in

[1] The *Radd-ul-Muhtâr* is explicit on this point, that it does not take effect.

sadakah or charity, and the money so employed recouped to the estate of the minor. According to Abû Yusuf, the profits made in such trade would belong to the minor, and Kâzi Khân declares the *Fatwa* is according to this view. But the Kâzi can authorise the executor to trade for the infant with his goods or enter into partnership with another.

The executor can, if it is to the advantage of the infant and there is a need for it, let out the infant's property on hire, but he cannot create a mortgage without the leave of the Kâzi. He is authorised, however, to pledge or sell the chattels, if it is necessary for the maintenance of the infant children of the testator.

If the executor sells the goods on credit, the period for which credit is given must be the customary period. But where it is to the disadvantage of the infant or the period for which credit is given is either too long or not customary, according to Ramli the transaction will not be valid.

Where there are two infants under the guardianship of two separate executors, the sale of the goods of one infant by his guardian to the other is stated by Kâzi Khân not to be lawful. And this view is accepted in the *Alamgiri*. The correctness of this principle has been questioned in the *Radd-ul-Muhtâr*, where it is laid down that there is no reason to render such a sale invalid, "for," the author adds, "the dealing by the executor is not for himself, and the sale of a particular property on behalf of one infant may be as much advantageous to him as its purchase by the other."[1]

The executor is liable for any serious inadequacy in the consideration of any property sold or purchased on behalf of the infant.

The executor must not spend at the funeral of the testator more than is customary.

When an infant has not attained discretion, and the executor has made over the property to him and it is lost, the executor is liable. Discretion (*rushd*) means the capacity to take care of one's property. Abû Hanîfa holds that an executor should not make

[1] "And when an executor of two orphans sells the property of one of them to the other, the sale is unlawful. So, also, when he authorises them to enter into such a transaction with each other and one accordingly sells his property to the other, the sale is unlawful."—*Alamgiri*, Vol. VI, p. 228.

over the property until the ward has attained his 25th year. But the Disciples are of opinion that discretion should be presumed when the infant attains majority, but the presumption may be rebutted by proof of the fact that he is weak in intellect, or unqualified to take proper care of his property.

When the testator devises one-third of his estate to be disposed of according to the *joint* discretion of his executors,[1]—and if one of them dies, "the third will be returned to the heirs."

When the heirs are all *sui juris* and present, the executor cannot sell any portion of the estate except under their authority. But if they are absent, he can only sell the chattels belonging to the estate, but not the *akâr* or immovable property. But he is authorised, in case there be need for it, to lease the immovable estate. The reason of this restriction is founded on the principle that an executor has the power of conservation over the property of an absent person, and as it may be necessary to dispose of the movables which may be likely to be wasted, the executor has the power to do so and realise for the absentee the price of such goods. But *akâr* or immovable property is secure in itself, and the executor has no authority to part with it, *except in the case of its falling into decay*, and in that case it may also be sold. When all the heirs are adult and one of them is *absent*, while the others are present, the executor may, by general consensus, sell the share of the absentee in all that is not *akâr* for the sake of preserving it. According to Abû Hanîfa, the *wasi* may also sell the shares of those who are present; but, according to the Disciples, the sale of their shares is unlawful and this is the accepted doctrine.

All this refers to cases where the testator has left no debts nor legacies. But if there are debts and they cover the whole of the estate, the executor may sell the whole by general agreement; and when the debts do not cover the whole estate, he may sell as much of it as may be necessary for the payment of such debts. When, however, an executor has actually sold *akâr* or immovable property in good faith for the payment of debts while he has other property in his hands sufficient for that purpose, the sale is lawful. Similarly, if there are general legacies, the executor may sell as

[1] *Lit.* To do whatever they together like with it.

much of the property as may be necessary for their liquidation (not exceeding of course a third of the whole after payment of the debts).

If a person dies leaving several heirs, one of whom is a minor and the rest are adult, and his estate is not burdened either with debts or legacies, and consists entirely of chattels, the executor may sell the share of the minor and invest the proceeds in some more profitable property.[1]

The *wasi* cannot borrow from the funds in his own hands belonging to the infant.

The executor can take his fixed allowance from the estate and nothing more, but the father, if in want, can support himself "to the extent of necessity" from the property of his infant child. This, however, does not apply to the executor.

A gratuitous executor cannot be compelled to administer to the estate of the testator, and the Kâẓi, therefore, has the power to fix an allowance for him. The *Fatwa* is according to this.[2]

In the *Kâzi Khân*, however, it is stated that where no allowance is fixed for the executor, he can take a limited and reasonable sum for his remuneration "to the extent of his necessity;" and, if there is any need for it, he can make use of the infant's conveyances in going to and fro on the work of the infant, though several jurists hold that this would not be valid.

Among the Hanafis, the executor of the father is entitled to the curatorship of the testator's infant children in preference to the grandfather.

The *wasi* cannot make a binding acknowledgment of a debt against the estate of the testator, and the acknowledgee (اقرار) would not be entitled to receive his demand until he establishes his claim by proof.[3]

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[1] This is *Bi'l-ijmaa* or by general agreement; Abû Hanîfa is of opinion that he may sell the shares of the others also, but in this view, Abû Yusuf and Mohammed differ.

[2] "And a *Fatwa* to this effect is in the *Hamâdia* and I have given several similar *Fatwas*."

[3] "And if the *wasi* pays to the claimant what he demands, the *wasi* will be liable If the claimant has no proof, but the executor knows that the demand is just, recourse must be had to the procedure mentioned by Kâzi Khân."

Nor can the *wasi* acknowledge that somebody else is entitled to a share in the inheritance, unless he himself is an heir, when the acknowledgment will have operation against his own share.

When a person has died intestate without appointing an executor and no reference is made to the Kâzi,[1] one of the neighbours (*ahl-i-mahalla*) may legally administer "according to necessity." And the *Fatwa* is on this.

When the estate of a deceased person is subject to debts, but the debts do not overwhelm the estate, in other words, do not exceed the assets—and it is divided among the heirs; and subsequent to the partition, a creditor of the estate appears, he will be entitled to recover the debt due to him proportionately from the different heirs. He can do this, however, only by taking all of them before the Kâzi. But if he proceeds[2] against any one of them, he can recover his debt to the extent of the share in such person's hands whatever that be.[3]

The right of guardianship in respect of the property of infant children belongs preferentially to the father; in his absence to his executor; when the father has died without appointing an executor, the guardianship appertains to the grandfather, and in his absence to *his* executor, and to his executor's executor. If there are none of these, the guardianship belongs to the Kâzi and his appointee.[4]

In the *Alamgiri* the above principle is stated in the following terms:—"The executor of a father is in the place of a father. So, also, the executor of a grandfather is in the place of a father's executor, and the executor of a grandfather's executor is in the place of the grandfather's executor. And the executor of the Judge's executor is in the place of the Judge's executor when his appointment was general."

If the father dies after appointing an executor and leaving him surviving several children, some of these whom are adult and some minors; and, subsequent to the testator's death, some of these

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[1] "If injury be apprehended from reference to the Kazi."

[2] *Lit.* "if he can get hold of any one of them."

[3] I have tried to adhere as closely as possible to the phraseology of the text.

[4] According to Mohammed, the grandfather comes after the father; the view in the text is that of Khassâf, according to whom is the *Fatwa*.

children were to die leaving them surviving infant children, the executor of the father would be the *wasi* of these children also, and would be entitled to manage their properties both movable and immovable, or to sell them [under the restrictions mentioned before].

But a *wasi* appointed by the brother, mother, uncle or any other relation has no such powers. They cannot sell the immovable property of the minor ; and are only authorised to take care of the infant and his property ; they cannot trade for him ; and they can only buy things which are necessary for the infant, such as food and raiment ; and they can only sell chattels inherited by the infant from the person who has appointed the executor, "for the preservation of the price of chattels is easier than of the things themselves."[1]

To summarise—a *wasi* appointed by the mother has no power to intermeddle with any property which her children may have inherited from their father or any other relation, whether it be involved in debt or not ; nor can he sell any portion of the immovable property inherited from her, unless it is involved in debt or burdened with the payment of legacies. If the estate is involved in debt or burdened with legacies, he can sell any portion of the property, whether movable or immovable, sufficient to pay off the debt. If all the heirs are adult and present, and the estate is free from debt, he can sell no portion of it, but if the estate is involved in debt, his powers are subject to the same rules which apply to an executor appointed by the father. If some of the heirs are adult and some minors, and the adult are absent, and the estate is free from debt, he can sell what is movable, whether it belongs to the share of the minor or the adult, but cannot sell the *akâr* of either the minors or adults. If the estate be involved in debt, his powers are exactly similar to those of the father's *wasi*. If the adults are present and the estate free from debt, the executor may sell the minor's share of the movable estate, but as to whether he can sell the share of the adults opinions differ, but he certainly cannot sell the *akâr*. The mother's *wasi* cannot lawfully purchase anything for her minor children, except food and clothing which are necessary for their preservation. Whatever has been said as to the executor of the mother is true of the executor of the brother

[1] *Radd-ul-Muhtâr*, Vol V, p. 697.

and the paternal uncle, the principle being that the power of the executor is measured by the power of his testator."

The executor is entitled to repay himself any expenditure incurred by him on behalf of the infants, but he must keep proof thereof. In the *Kâzi Khân*, however, it is stated, that he may recoup himself, though he may have no witnesses of the fact that he has incurred the particular expenditure. None of these restrictions apply to a father or mother, when either of them happen to be the guardian. But it is perferable that they should also keep evidence.

The executor is also entitled to a recover from the estate in his hands any expenses laid by him out of his own pocket, for the funeral of the testator or of any of his heirs ; or in the discharge of the debts of the testator or his heirs.

Where an executor pays any claim made against the estate of the deceased *without due proof* thereof, he will not be entitled to any credit for such payment in the administration of the testator's assets, when the payment is questioned by the creditors of the deceased. But no responsibility attaches to him if the payment is made upon satisfactory evidence. "Whether he can pay when two just persons testify to a debt in his presence but do not testify to it before the Judge, and the debt is denied by the heirs, is a point upon which 'our' shaikhs have differed, some saying that he may pay the debt and others that he may not."[1]

Where the executor has satisfied one creditor without an order of the Judge, he is responsible to the other creditors ; but it is otherwise if he made the payment under the direction of the Judge. Similarly, when a debt has been made obligatory on the estate of the deceased by the decree of a Judge, and the executor has satisfied it, after which another person prefers a claim against the estate, the executor is not liable if the payment was made under the Judge's order. But the second creditor may have recourse against the first for a share of what he received proportionate to the debt, if what he received be still subsisting ; and if it has perished in his hands, he is responsible to the second in the same proportion, but the executor is in nowise liable. If, on the other hand, the executor had paid without the order of the Judge, the second creditor may claim either from the executor, or the first creditor, a due

[1] *Alamgiri*, Vol., VI, p 235.

proportion of what was received by the latter.[1] When an executor has expended the whole of the estate upon the infant children of the testator and nothing remains, after which a claim is made against the estate and is established by proof before the Judge who decrees it, can this creditor make the executor liable? It seems that if the expenditure was made by order of the Judge, the executor is not responsible, whereas if it were made without the Judge's order, he is liable.

An executor is not responsible for any loss or destruction of the deceased's property, unless occasioned by his departure from the conditions or rules of his office, or by some personal neglect. If he be a creditor of the deceased, he can lawfully pay himself out of the property in his hands without the order of a Judge when he has proof of the debt, though some lawyers think he may do so in all cases without a Judge's order. According to the *Sarâir*, the executor cannot purchase for himself on his own account any portion of the deceased's property, but the Mohakkik thinks "he may lawfully do so at a just valuation." Shiah Law.

The Shiahs differ from the Hanafis in holding, that the appointment of any other person, as *wasi*, is not valid in the presence of the father of the deceased, for the right of guardianship over the minor children belongs to the grandfather to the exclusion of the father's executor. Ibn Junaid, however, thinks that the nomination by the father is valid "to the extent of a third of his property and for the discharge of all rights or claims upon his estate."

According to the Hanafis, the competency of an executor has reference to the time of the testator's death. For example, if a minor or a slave is appointed as a *wasi* and he attains his majority before the testator's decease, the appointment is effective. Some of the Shiah jurists hold the same view, pre-eminently Ibn Junaid. According to the Mohakkik, however, the generally received doctrine is, that the qualifications required in an executor have reference to the time of his appointment, and, consequently, the

[1] "When an executor wishes to pay a debt to a creditor and is apprehensive of other creditors appearing against the deceased, he may sell something belonging ing to the estate to the creditor in exchange for the debt, and will not then be responsible, should another creditor appear as apprehended."—*Alamgiri*, Vol. VI, p 235.

appointment of a minor, or a slave, or any person otherwise incompetent, is initially invalid, though the disability may cease prior to the testator's death.

The testator can appoint a *wasi* or guardian for every person over whom he can exercise the *patria potestas* of the Mahommedan Law, as for example, a child how low soever in descent, provided that the child is of tender age or a minor. But if a person should appoint an executor for his children who are *sui juris*, the appointment is of no effect in law. And even though the appointment should be for the superintendence of property which the testator himself has left to the parties, the executor has no right to deal with it even to the extent of a third. He can however, lawfully separate from it enough for the discharge of his debts and bequests.

It is lawful for every one, who has the superintendence of the property of an orphan, to take from it the ordinary remuneration due for his trouble.

Limited executorship. Hanafi Law.

When a person appoints one executor for a particular purpose, *e. g.*, for the payment of his debts, and another for the administration of his property generally, or if he uses the following expression, "I have appointed so-and-so my executor to pay my debts and do not appoint him for anything else, and I have appointed so-and-so my executor for all my property," both are executors in all matters, according to Abû Hanîfa and Abû Yusuf, as if he had appointed them both *generally*, but according to Mohammed each is restricted to the particular purpose for which he has been appointed. Where it is made an express condition that one shall not be executor in the matter to which the other is appointed, it has been said by Mohammed ibn ul-Fazl that their powers will be limited according to the directions of the testator, and it is only where he has not made any such condition that there is the difference of opinion above mentioned, the *Fatwa* being with Abû Yusaf.

Derivative executors. Hanafi Law.

With reference to the transmissibility of the office of executor, there is considerable difference, as pointed out already, between the Hanafîs and the Shiahs. The provisions of the Hanafî law are, in some respects, analogous to the principles of the English Law. For example, although under the English Law, the executor cannot assign the executorship, yet the interest vested in him by the will of the deceased may, generally speaking, be continued

and kept alive by the will of the executor; so that if there be a sole executor of *A*, the executor of the executor is, to all intents and purposes, the executor and representative of the first testator Similarly, under the Hanafî Law, an executor may, on the approach of death, appoint a successor though the power may not have been expressly reserved to him by the testator.[1] It is not necessary that the executor should expressly constitute *his* executor to be the *wasi* of his testator's estate; the mere appointment as *wasi* to the executor carries with it the power to administer both estates. And if *A* appoints *B* as his executor and *C* appoints *A* as his executor, upon the death of *A* and *C*, the executorship of both *A* and *C* devolves on *B*. According to the generally approved doctrine among the Shiahs, the executor can transmit the office, or appoint a successor, only when the testator has authorised him to entrust to another the management of the estate at his own death. When a person dies without appointing an executor, or when an executor dies to whom the authority to appoint a successor was not given, the superintendence of the original testator's estate devolves upon the Judge. If there is no Judge present on the spot, any true believer in whom confidence can be placed may lawfully assume the care and management of the estate. "But, on this point," says the Mohâkkik, "there is room for doubt and difference of opinion."[2] Shiah Law.

"A person dies leaving two minor children. These on attaining majority demand their inheritance from the *wasi*, who says that the entire inheritance left by their father was 1000 dirhems which had been spent on them. One of the sons affirms the statement of the executor, but the other does not. The latter will be entitled to recover, according to Zuffer, 250 dirhems from the first but not from the executor. And this is also the view of Abû Hanîfa. Ibn Abî Mâlik, however, reports from Abû Yusuf that he can. So it is said in *Muhît-i-Sarakhsi*."[3]

[1] In the case of *Shaikh Hafiz-ur-Rahman* v. *Khadim Hossain*, 4 N. W. P Reps., p 106, it was held that under the Mahommedan Law, an executor is entitled to nominate a successor to carry out the purposes of the will under which he was made executor. This is of course under the Hanafi Law.

[2] In the *Jâmaa-ush-Shittât* the approved doctrine is stated to be that where reference to a Judge is impossible, it is incumbent (*wâjib*) upon the just "Momins" to assume the management.

[3] *Alamgiri*, Vol. VI, p 221.

"If a person die leaving minor children and a father, but without appointing an executor, the father is in the position of an executor for the protection of the inheritance (فی حفظ التر کة) and can administer the property in whatever way it may be necessary. And if the deceased has left heavy debts, (دین کثیر) the father that is, the grandfather of the minors, has no authority to sell the inheritance for the payment of the debts. Similarly, if a person authorises his adolescent son (صغیر المراهق) possessed of understanding to buy and sell, and he enters into any transaction and becomes indebted, after which he (the son) dies leaving his father, the father will have no power, to deal with the son's property to pay his debts."[1]

"A person, who is in debt, makes certain bequests, all of which, after the payment of the debt, can be discharged out of the third. He dies leaving a house; and the *wasi* cannot pay his debts or discharge the legacies, without the price of the house; but the heirs are not agreeable to the sale of the house, when the debts do not cover the whole house or the major portion of the house, so as to leave a small part of it,—in such case, the *wasi* is empowered to sell the house, and he should sell it if he is aware that the debts will remain unpaid for a long time if he does not sell it."[2]

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[1] *Alamgiri*, Vol. VI, p 225.

[2] *Alamgiri*, Vol VI, p 227

CHAPTER XXIV

THE LAW OF WILLS (SHAFEI DOCTRINES).

SECTION I.

GENERAL OBSERVATIONS.

THE power to will is vested in everybody, Moslem or non-Moslem, without distinction of sex, who is *sui juris*, possessing reason, free, and, "according to our doctrines," not labouring under the inhibition of imbecility.

The power is not given to an alien, to a person in a state of trance, or to a minor, though a jurist has maintained that this prohibition should not extend to a minor, who has attained the age of discretion. A slave cannot make a will unless, according to some jurists, he had been liberated after having made his will, and had died without having renewed his dispositions.[1]

Testamentary dispositions in favour of the public must have a lawful object; thus a will could not be made for the support of a Christian church or a synagogue. A legacy in favour of one or more individuals is lawful if the person or persons designated are capable of exercising the right of proprietorship. Thus, a legacy in favour of a child *en ventre sa mère* only takes effect on the two-fold condition, that such child should be born alive, and that the conception should have taken place before the time of making the disposition, that is to say, that the birth should take place before six months should have elapsed from the date of the will. If the birth takes place beyond the period of six months, the child is supposed not to have been conceived previous to the testamentary disposition, at least if the parents have not ceased to cohabit

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[1] تصح وصية كل مكلف حرّ وان كان كافرا وكذا محجور عليه بسفه على المذهب لا مجنون ومغمى عليه وصبي &c.

with each other. In the opposite case, conception is admissible for a maximum term of four years. A will in favour of a slave reverts to the master, unless the slave has been freed before the testator's decease. As for subsequent liberation, followed by an acceptance on the part of the slave, the result depends upon the question, whether the possession of the legacy has been acquired or not before the death of the testator. Testamentary dispositions in favour of animals are absolutely void, whether the intention was expressed to constitute the animal as proprietor, or whether nothing to that effect had been mentioned; but if a declaration has been made that the animal should never want for necessary food, traditional doctrine admits the validity.

A legacy for the support of a mosque is legal, and even a will "in favour of a mosque," without adding anything else. However, in this case, the disposition is supposed to have been made, not only for the support, but also for the embellishment of the edifice. Moreover, a will may be made in favor of an infidel, either subject to a Mahommedan prince or not, of an apostate, and of one's own murderer. A legacy in favour of an heir can only take effect with the unanimous consent of the co-heirs, pronounced after the succession has passed. This approbation is necessary even if the co-heirs renounce the succession, and it cannot be given before the death of the testator. But the disposition is only rendered invalid by the existence of co-heirs at the time of the decease, and this cannot be declared previously. A testamentary disposition, the effect of which is to leave each heir his legitimate inheritance, is null and void; but there is no impediment against giving any one heir, by testament, any particular thing being the value of the portion due to him by law. Only the act must be approved of by the co-heirs.

A person may lawfully devise the following objects:—

1. The usufruct of things that do not suffer in the course of time.

2. The future fruit of a tree, the future young of an animal, &c.

3. One of two objects, the legatee to take his choice.

4. An impure thing, provided its use is not prohibited by law, for example a trained dog, the juice of grapes not meant for fermentation, &c.

A legacy worded as "one of my dogs," must be carried out by the heir giving any dog belonging to the defunct, and the disposition is null and void if the testator possessed none. A person, who possesses many dogs among his property, may give away all or some of them by will, even if the dogs constitute the major portion of the heritage. If a person possess two drums, the one a musical instrument for amusement, the other an instrument to be used legitimately—for example, a war-drum, or a drum used by pilgrims, the bequest of "a drum" without further particulars would refer to the latter. Furthermore, a special legacy of a drum for amusement is null and void, unless it can, at the same time, be used for warlike purposes and pilgrimages.

Section II.

Rules as to the Third.

Testamentary dispositions should not exceed the third of the property of the testator; and such as have been made contrary to the precepts of the law will be reduced to the allotted portion, upon demand of the heir or heirs. When, on the other hand, the heir declares his approval of the disposition, it takes effect, whatever the amount may be; but, according to one jurist, it is then considered as a pure donation by the heir.

The reduction is determined by collecting all the property existing on the day of the decease, or, according to others, on the day the disposition is made. By the dispositions to which effect should be given out of the third are understood the following:—

(1) Gratuitous emancipation which is to be effected upon the death of the testator.

(2) Voluntary dispositions, such as *wakfs* and *hibas*, constituted during the last illness.

(3) Payment of lawful debts.

In case all this should exceed the disposable third, the following rules must be observed in the reduction:—

1st. When the testamentary disposition consists simply of a direction to enfranchise slaves, lots must be drawn in order to decide which of them should be deprived of his liberty in consequence of the reduction.

2nd. When the testamentary dispositions consist of bounties of different kinds, all are subject to a proportionate reduction.

3rd. When the dispositions include the liberation of slaves as well as other bounties, the portions available must first be divided in proportion to the two categories of the legacy, and then the same rule as we have mentioned in the 1st and 2nd clauses must have effect.

Marz-ul-Mout. A person, who is suffering from an illness from which there is an apprehension of death, cannot make a valid disposition of more than one-third of his available assets; but if he recovers against all hope, these dispositions cannot be impugned. If a person be suffering from a slight illness involving no danger to his life, he can dispose of his property unrestrictedly; and even if he dies during this illness unexpectedly, his dispositions take their full legitimate effect. This would not be the case if thed eath was the natural result of the illness from which he was suffering, though it be not considered of a dangerous nature, for under such circumstances it proves itself to have been dangerous. In case of uncertainty about the character of the disease, it must be referred to two doctors, free and irreproachable. The following are considered by the law to be dangerous diseases:—colic, pleurisy, incessant bleeding from the nose, chronic diarrhœa, hectic fever, the commencement of (even partial,) paralysis, the vomiting of food without its having undergone any change in the stomach, and even vomiting in general, if it is very bad and accompanied by pains and effusions of blood, continual or intermittent fever, but not ague. The following circumstances are assimilated by "our" doctrines to dangerous diseases:—having been made prisoner of war by infidels who give no quarter; being in a routed army-corps, assailed by the conqueror; having been condemned to death in retaliation, or to be stoned to death; being in a vessel during a storm, or in a rough sea; a woman undergoing great labour-pains, be it before or after confinement, as long as the fœtus has not severed the membrane.

Testamentary dispositions are formulated thus,—"I leave to him such or such thing," "Remit it to him," "Give it to him after my death," "I make it his," "It shall be his after my death," but in saying only, "It is his," not a legacy but an avowal is pronounced, On the contrary, if it be said—"It is his in my succession," it is a valid testamentary disposition. Testamentary dispositions can

be formulated in another manner, which though not so explicit, equally indicates the last will, for example, a written statement containing the will given to the witnesses.

A legacy in favour of a class of people, as for example, "the poor" need not be accepted expressly, but the decease of the testator renders it irrevocable; while, on the contrary, a legacy in favour of one or two given people must be formally accepted by them. This acceptance, like the repudiation of a legacy, can not take place during the testator's lifetime, and it is, even, not customary that the legatee should declare his wish immediately upon the testator's decease. A legacy becomes null by the predecease of the legatee; if, he dies after the testator but before having accepted the legacy, the right of acceptance devolves upon his heirs. As regards the question,—when does the property become the legatee's, some jurists consider he becomes entitled to possession immediately upon the death of the testator, provided he accepts the legacy; others maintain that he only becomes the proprietor upon accepting it; others, again, hold that previous to the acceptance the legacy is suspended, but that the legatee is the actual possessor from the time of the testator's death if he accepts, otherwise the heirs are presumed not to have lost possession thereof. The three different doctrines we have enunciated on the subject of legacy between decease and acceptance, also exist with regard to fruit and to earnings realised by a bequeathed slave as well as with regard to other expenses, such as the support of a slave, and the money to be paid to him for observing a fast. According to the authors, who admit that a legacy remains suspended until the legatee has accepted or rejected the same, he must, nevertheless, provide for the temporary support of the slave or of the animal bequeathed.

Section III.

The Legatees.

If a person were to bequeath "a sheep from my flock," the disposition will be void if the testator possessed no flock of sheep; but if he had said "a sheep from my inheritance," in case the testator should leave no sheep, one must be bought and given to the legatee.

A legacy in favour of "the child of which a certain woman is *enceinte*," devolves upon the two children if she gives birth to twins;

and upon the child born alive, if she gives birth to twins of which one is still-born. If, on the contrary, the testator added, "if it be a boy," or "if it be a girl," the birth of twins, if one be a boy and the other a girl, renders the disposition null and void. The legacy can only be claimed by the boy exclusive of the girl, should the testator have added, "If she bears a boy within her bosom." Finally, a legacy worded thus is also valid, "in case the woman in question should give birth to two twin boys;" and the heir can, under these circumstances, give the bequeathed object to one of the children according to his own choice.

A legacy in favour of a person's "neighbours" extends to forty houses in four different quarters; a legacy in favour of "learned men" includes all those who study law, that is, the Koran, the traditions of the Prophet and jurisprudence. But it does not extend to the simple readers of the Koran, to men of letters, interpreters of dreams and doctors, nor, according to most jurists, to theologians, properly speaking.

A legacy in favour of the poor also implies the indigent and *vice versâ;* in both cases, the legacy must be divided into two equal portions—one for each class, provided it consists of at least three persons. The testator may, also, bequeath to one of the persons of the category in question, more than to the others who have the right; while, according to our doctrines, a legacy "to such a person and to the poor," results in the person designated not receiving more than each separate one, however little the portion may be, so long as there is some value. Only the person mentioned must not be entirely excluded.

One may also bequeath not only to a certain category of people without indicating the number of individuals of which it is composed, for example "to the Alides," but also to a fixed number, for example "to three persons" of a certain category, and "to the relations" of a certain person. Regarding this latter form of legacy it must be remarked that it implies all the relations even the most distant, excepting relations of the direct line, be it ascendant or descendant. However, the relatives on the mother's side are not understood in the testamentary dispositions made by the Arabs in favour of "relations," unless specially mentioned. In order to find out the "relatives" of the person favoured by the testator—you must take the nearest ascendant, and this person's

descendants remaining in the tribe, are those the testator must be considered to have had in view. If, on the other hand, the testator used the expression, "the nearest relatives" the legacy also applies to the direct line, always providing that the son takes precedence over the father, and the brother over the paternal grandfather, but beyond these exceptions the law gives no preference under these circumstances to either sex. The father and mother, sister and brother are all equal participators in the legacy, and even the son of the daughter takes precedence over the great-grandson agnate. A legacy in favour of a person's own relatives (*akriba*), does not include the rightful heirs.

What may be bequeathed

One can bequeath the usufruct of a slave or of a house, as well as the lease of a shop. In that case, the legatee has not only the full enjoyment of the service of the slave, but also gets the proceeds of his work, and even of her marriage-dower, if the slave be a woman. Furthermore, if the slave gives birth to a child during the duration of the usufruct, its condition is the same as its mother's, that is to say—the legatee has the usufruct of it and it does not become the property of the heir. But the heir has the right of enfranchisement, and he must support it, making no distinction between temporary and perpetual usufruct. The sale of a thing, the usufruct of which to the extent of one-third has been bequeathed for a limited period of time, has the same consequences as the sale of a hired object; but a perpetual usufruct may not be sold unless to the legatee. If one should desire to know whether the legacy exceeds the disposable third or not, the perpetual usufruct of a slave must be assimilated to actual possession; if the usufruct be only temporary, the value of the slave's services must be ascertained with regard to the length of time during which the proprietor is deprived of the same.

A person may legitimately direct his heir to make, or to cause to be made, a voluntary pilgrimage which he himself intended to undertake. In this case, the heir must pay the journey to Mecca, from the station fixed by the law, unless the deceased mentioned any special town whence the pilgrimage should start. As regards the obligatory pilgrimage neglected by the deceased, this act of devotion falls to the charge of the bulk of the property; though, if the testator has enjoined the heir to bear the costs either from the bulk or from the disposible third, his last will must be regarded.

If the deceased expressed no wish on this point, the charge imposed upon the heir to accomplish the neglected compulsory pilgrimage, falls upon the bulk, or according to others, upon the disposable third; but in every case this charge only relates to the journey commencing from the station fixed by the law. Any person, though he be not one of the family, can make the necessary pilgrimage on behalf of the deceased, without any express mandate from him.

The heir must also take upon himself the discharge of pecuniary liabilities for expiations fixed by the deceased, the fulfilment of which had been neglected. With regard to other expiations, the heir may, according to his own choice, give food or clothing to the poor, if necessary, and even enfranchise a slave. In any case, and whatever be the nature of the expiations, the heir can fulfil it at his own cost if the inheritance be not adequate, and it counts equally as an act of the deceased. If the expiation is made by a person other than a member of the family, the conditions are the same as regards the distribution of food and clothing, but not if the expiation consists in enfranchising a slave. The soul of the deceased is benefited by alms and pious invocations made on its behalf, whether they be offered by his heirs or any other persons.

Revocation. A testamentary disposition is wholly or partially revocable. It may be revoked:—

1. Verbally, for example, by pronouncing the words "I cancel the will," "I annul it," "I revoke it," "I renounce it," or "the thing which I have bequeathed, shall nevertheless be my heir's."

2. By the fact of having disposed of the bequeathed object, by sale, enfranchisement, marriage, gift, or by pledging it, even if, in the two latter cases, the seisin by the donee or the creditor have not taken place.

3. By a charge imposed in a later will—upon the heir to dispose of the object bequeathed in any manner mentioned in part. 2

4. By the order to sell the thing bequeathed by putting it up for sale, even if unsuccessfully, or by the fact of mixing other objects with the thing which has been bequeathed. If a particular kind of wheat is bequeathed and it is mixed with some other wheat, that very fact is sufficient to constitute an ademption even though the wheat added to the heap is of a superior quality. But if it be of equal, or inferior quality, the fact of having mixed

it with the first wheat, does not constitute a revocation of the bequest. Revocation also results from the following facts:—from having ground the bequeathed wheat, having sown one's field with it, having made the bequeathed flour into bread, having spun the cotton bequeathed, having woven the threads bequeathed, having made a bequeathed piece of stuff into a shirt, having built or planted upon bequeathed ground.

Executor.

The Prophet has introduced the custom of appointing testamentary executors, to take charge of the payment of the testator's debts, of the execution of his last will, and the guardianship of his infant children. An executor must be a Moslem, *sui juris*, possessed of full reason, free, irreproachable and capable of the charge entrusted to him. An infidel subject of a Mussulman prince may be appointed executor by a co-religionist; nor is blindness any cause for incapacity.

The law does not exact that the executor should be of the male sex; the mother of the infant children ought to be considered more capable of bringing them up than any other person.

An executor must be deposed for notorious bad conduct; this principle applies also to a Judge, but not to the Head of the State.

This right of appointing an executor to undertake the payment of debts and the execution of the last will of the testator is accorded to all Mussulmans of age,—possessed of understanding and free; but the right of vesting the executor with the guardianship of young children, belongs exclusively to the person who is their legitimate guardian. An executor cannot, in his turn, appoint by will a person to replace him after his own death, unless such power had been given him by the primary testator. Nothing prevents the nomination of two executors to succeed one another: this can be done by the words, "I make you my testamentary executor until the majority of my son," or "until the arrival of Zaid and then my son," "or Zaid will take charge of this will." On the other hand, a testamentary executor cannot be appointed to the guardianship of the children, during the lifetime of their paternal grand father, their natural guardian, if he is capable of undertaking the guardianship.

It is prohibited to give the executor the power of making a contract of marriage for the son of the deceased during minority or to represent the daughter of the deceased in a similar contract.

The words by which an executor may be appointed are :—" I nominate you my testamentary executor," " I entrust my affairs to you," etc. ; but there is no impediment against adding a suspensive condition. Beside this, the duty with which the executor is being charged must be clearly defined, for if nothing more is said than, " I nominate you my executor,' the disposition is void. The nomination of an executor has no effect before the duty has been accepted, and this acceptance must take place during the testator's lifetime.

If the testator has appointed two executors, neither of them can act without the assistance of the other, unless the power has been formally given to him. The testator can revoke the nomination at any time, and the executor can renounce it even after acceptance if he think fit. Upon an infant attaining majority, an executor charged with the guardianship must give an account of his administration, and in case of dissent the law presumes in favour of the executor's words, if the question concern the minor's maintenance. On the other hand, the law presumes in favour of the latter if the dispute relates to any sum which the executor maintains he gave to his ward after he attained majority.

CHAPTER XXV.

THE LAW OF PRE-EMPTION.

SECTION I.

GENERAL OBSERVATIONS.

THE law of pre-emption was introduced in this country by the Mahommedans. In certain parts, it is now the territorial law and is applicable to persons other than Mahommedans from the fact of the property being situated there. In other parts, its operation depends on custom. If it is customary, it applies to both Mahommedans and non-Mahommedans. In places where it is neither territorial (as it is in Behar[1] and parts of the Punjab and the North-Western Provinces,) or customary as in Oude and Bengal, it is applicable only to Mussulmans.

Shufâ means the right which one person has of acquiring a property sold to another in preference to that other by paying a price equal to that settled, or paid by the latter. The right of *shufâ* or pre-emption owes its origin to motives of expediency and a desire to prevent the introduction of a stranger among co-sharers and neighbours likely to cause inconvenience or vexation. It applies only to immovable property, whether held jointly or separately, and whether capable of partition or not, and comes into operation when the property in respect of which the right is claimed is transferred for a consideration. Hanafi Law.

It does not, therefore, take effect with regard to property which has devolved by right of inheritance, or which has been received in gift without any consideration.[2] Nor does it arise in respect of property bailed to another or given in lieu of services rendered or to be rendered, or by way of a reward, or as a compensation for *khula*,

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[1] *See Joy Kaor* v *Saroop Narain Thakoor*, 1 W. R, 1864, p. 259; *Mohesa Lall* v. *Christian*, 6 W. R, 250

[2] Comp. *Amir Ally* v. *Pearson*, W R, 1864, p 239.

or as a dower to a wife. In other words, when a woman conveys a property to her husband in consideration of his granting a divorce, or which a man conveys to a wife in consideration of marriage, no right of pre-emption arises thereto. Similarly, if a man were to marry without settling on the wife any dower and after the marriage were to settle on or convey to her a property in lieu of dower, there would be no right of pre-emption. If a property is conveyed to a wife in discharge of the dower-debt, in this case also there is no right of pre-emption. But when a house is sold to a third person in order to enable the husband to satisfy with the proceeds thereof the dower of his wife, the right of pre-emption comes into operation.[1] The reason of these rules is self-evident. The wife conveying to the husband and *vice versâ* do not thereby introduce a stranger among co-sharers or neighbours.

Nor does the right of pre-emption apply to leases in perpetuity, however small the rent reserved may be.[2]

When one co-sharer conveys his share to another co-sharer, no other co-sharer, if any, can have a right of pre-emption, the rights of all being equal, and the reason on which the right is founded, therefore, being absent. In other words, no right of pre-emption arises in favour of a coparcener when the purchaser himself is a co-sharer of the vendor and the claimant.

But where a co-sharer associates a stranger with him in the purchase of a share, another co-sharer is entitled to pre-empt the whole of the property sold, but it is not obligatory upon him to impeach the sale so far as the co-sharer vendee is concerned.[3]

Nor is the owner of a piece of land entitled to pre-emption of a house standing thereon, where his property in the land is wholly separate and distinct from the property in the house which belongs to another person with whom the owner has nothing in common.[4]

The right of pre-emption takes effect with regard to property conveyed to another by virtue of a compromise of a claim. For

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[1] The decision in *Fida Ali* v. *Mozuffer Ali*. I. L. R., 5 All., p. 65, does not seem to be correct.

[2] *Ram Golam Sing* v. *Nursing Sahoy*, 25 W. R. 78 Nor where there has been no real and *bonâ fide* sale according to Mahommedan Law, *Mokur Bibee* v *Juggurnath Chowdhry*, W. R., 78.

[3] *Harjas* v. *Kanhya*, I. L R., 7 All, 118.

[4] *Pershadi Lall* v. *Irshad Ali*, 2 N. W, 100.

example, if a defendant were to compromise a suit by resigning or making over a house to the plaintiff after having denied his claim or acknowledged it or refused to accede to it, the right of pre-emption would take effect in respect thereof.

It takes effect also in respect of property conveyed by *hiba-ba-shart-ul-ewaz*, when the consideration agreed has been paid by the transferee, for a *hiba-ba-shart-ul-ewaz* is a sale in its effect.[1] But so long as the *ewaz* has not passed, there is no right of pre-emption.

The right of pre-emption arises only when the contract transferring the right of property from the vendor to the vendee has become complete.[2] A mere executory contract does not give rise to a right of pre-emption.. "Accordingly when a property is sold with a condition of option no right of pre-emption arises, for the power reserved by the seller being an impediment to the extinction of the seller's right of property and the right of *shufâ* is founded and rests upon the extinction of the seller's right of property as has been already explained."[3]

Nor does the right take effect in respect of a transfer made under an invalid sale, for the transferor under such a sale maintains all his rights intact and, so long as he has not delivered the property to the purchaser, can himself exercise his right of pre-emption over the transfer of an adjacent property.

Accordingly, the right of pre-emption does not take effect regarding a property transferred under an invalid sale either before or after the vendee has obtained possession thereof, because before possession the house belongs to the vendor and his right of property is not extinguished, and after possession there is still a probability that the bargain may be dissolved since the law admits the dissolution of a sale in case of invalidity.

But when once the vendor's right in the property transferred under an invalid sale has been extinguished and has vested in the vendee, he is entitled to exercise the right of pre-emption.

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[1] See *ante*, p. 131.

[2] *Soonder Koer* v. *Lalla Rughoobuur Dyal*, 10 W. R., 216 ; *Bukhsha Ali* v. *Tufuz Ali*, 20 W. R., 218.

[3] When the buyer or seller repudiates the sale, the Calcutta High Court has held that there can be no right of pre emption ; *Ojheeonnissa* v. *Rustam Ali*, W. R., 1864, p. 219.

Where one co-sharer mortgages his share in a certain property, none of the other sharers have any right of pre-emption until the equity of redemption is foreclosed.[1]

The person claiming a right of pre-emption can expressly or impliedly relinquish or waive his right, and once relinquished it cannot be asserted again.[2] Acquiescence with a knowledge of the sale would amount to waiver. But when once the right has vested in consequence of a completed contract, the dissolution of the contract by the vendor and the vendee by agreement or in exercise of the right of rejection on discovering any defect would not destroy the right of the pre-emptor to take the property for the price paid by the vendee.[3] For the pre-emptor is no party to the dissolution by mutual agreement between the seller and purchaser, nor can he be affected by the rejection of the vendor as he has no control over the latter's action, and accordingly, when once the right of pre-emption has come into existence, it cannot be destroyed by the action of others,[4] but may be destroyed by his own acts.

SECTION II.

PERSONS ENTITLED TO PRE-EMPT.

The Sunni Hanafi Law relating to the right of pre-emption is the law in force in this country either territorially or by custom, as stated already. According to the Hanafi Law three classes of persons are entitled to claim the right of pre-emption, not simultaneously, but in succession to each other. And the right may be claimed by one or more persons equally entitled to it.[5] It appertains,—

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[1] *Gurdial Misser* v *Tekharain Singh*, B L. R., Sup. Vol., 166, S. C., 2 W. R., 215; see also 11 W. R, 282, and 6 B. L R., App., 114.

[2] See 9 B. L. R., 253, S. C, 18 W. R, 401; also 24 W. R., 198; I L., 1 All., p. 521, where it was held not to have been abandoned.

[3] "Neither manhood, puberty, justice, or respectability of character are conditions of pre emption under the Mahommedan Law" 1 Agra, p. 236.

[4] 4 B L. R., A. C., 219

[5] 11 W. R, 169. In the case of *Gureeballah Khan* v *Kubul Lall Mitter* (13 W. R, 124), the Calcutta High Court with reference to the word *sharik* said as follows:—"The term sharik cannot be restricted to cases in which the parties enjoy the properties jointly. In the contemplation of Mahommedan Law those who occupy other houses in the same mansion are regarded as partners together with the person, the sale of whose share in a house gives rise to the question of pre-emption"

(1) to the co-sharer in the property, called a *shafi-i-sharîk*, "pre-emptor by right of coparcenary;"

(2) to a sharer in the rights and appurtenances, called a *shafi-i-khâlît*, "a pre-emptor by virtue of a right of easement over the property sold;"

(3) to a neighbour, or *shafi-i-jâr*, "pre-emptor by right of vicinage."

The *shafi-i-sharîk* has a stronger right than the *shafi-i-khâlît*,[1] and so the latter has a preferential claim to the *shafi-i-jâr*. In other words, one who has actually a share in the property has a stronger claim than a person who has a mere easement over the property. Similarly, a person claiming by right of vicinage or proximity stands in an inferior position to one who possesses a right of easement over the property sold.

In the case of *Chand Khan* v. *Niamat Khan*,[2] the owner of a servient tenement was held entitled, and correctly on principle, to a right of pre-emption in respect of the dominant tenement.

A joint owner of a part of the property (such as a partner in a particular room or in a cistern or reservoir in a field) has a superior right to one whose property is merely adjacent to that room or cistern or reservoir. And his right is superior even to that of one who is merely a neighbour to the entire property.

When a building situated in a private lane contains several houses and one of these houses is owned by two persons, one of whom sells his share to an outsider, the right of pre-emption appertains first to the vendor's co-sharer in the house, then to the partners in the building thereof, and next to the people in the street who are all alike. "If all these give up their right it belongs to the *mulâsik* or contiguous neighbour by whom is meant the neighbour behind the mansion sold who has a door opening into another street."

A house belonging to two persons is situate in a street which has no thoroughfare, and one of the partners sells his share to a stranger, the right of pre-emption belongs first to the partner in the house, then to a partner in a party wall, then to all the people in the

[1] See *Gholam Ali Khan* v. *Ayajut Roy*, 17 W. R., 343.

[2] 3 B. L. R., A. C., 296; S. C, 12 W. R., 162.

street equally, and then to the person whose house is behind that which is sold.

A person having a right of way over the property sold has a preferential claim to one who has only a right of water without any interest in the site of the water.

So where a piece of land is sold over which one person has a right of way and another a right to discharge the water of his house, the former's claim is stronger.

Between neighbours, proximity to the subject-matter of the claim gives the preference, for example, one who is nearest is preferred to one who is further off.

If a house situated in a blind lane shut up at one end, communicating through another blind lane but of greater extent, happen to be sold, the residents of the short lane only are entitled to the right of pre-emption ; whereas if a house situated in the long lane were sold, the inhabitants of both lanes would be so entitled. The *Hedâya* gives the reason of this thus: "that the right of egress and ingress in the short lane is participated only by its own inhabitants; whereas the right in the long lane appertains equally to the inhabitants of both, and therefore the residents of both lanes are entitled to claim the house by the right of pre-emption."

If the person who has a preferential right waives or relinquishes his right or claim, the person next in order would be entitled to enforce his own right. For example, if a *shafî-i-shafîk* abandon his right of pre-emption, it would devolve on one who is the holder of a dominant tenement, and if he also give up his right it would devolve on the *shafî-i-jâr* or neighbour.

The *jâr-i-mulâsik* or a person whose house is situated at the back of that which is sold, has a better claim than other neighbours, the reason being that his house is close to the living apartments of the house sold.

But when the house sold is large, consisting of several residences, the right of pre-emption belongs to the person residing adjacent to the house without any distinction as to the side on which he lives. Similarly, if any portion of the premises is sold. The reason of this is that when the house is large, consisting of several residences, to insist on the proximity of the living apartments would be useless.

When a house situate in a street without a thoroughfare belongs to two persons, one of whom sells his share, the right of pre-emption belongs, in the first place, to the other partner in the house. If he abandon his right, it would belong to the inhabitants of the street equally without any distinction between those who are contiguous and those who are not, for they are all *khâlîts* in the way. If they all surrender that right, it belongs to a *musâlik* or contiguous neighbour. If there be any street leading from this street and having no passage through it, and a house in it is sold, the right of pre-emption belongs to the inhabitants of this inner street, because they are more specially intermixed with it than the people of the other street; but if the house in the outer street be sold, the right of pre-emption belongs to the people of the inner as well as to those of the outer street, for the intermixture of both in the right of way being equal. If the street were open with a passage through and a mansion in it were sold, there would be no right of pre-emption except for the adjoining neighbour. In like manner, where there is a thoroughfare which is not private property between two mansions (that is when they are situate on opposite sides of the way) and one of them is sold, there is no pre-emption except for the adjoining neighbour. If the road be private property, it is the same as if there were no thoroughfare. But when the people residing in a particular street have no right to close it at any time, in other words when it is a public thoroughfare, persons residing there have no right of pre-emption.

When there are a number of persons entitled to claim a property by right of pre-emption[1] and some of them are absent, the Kâzi will adjudge the property to those who are present; but if the absentees appear subsequently and assert their claim, they would be entitled to their proportionate shares. In all these cases it is not necessary that the site should also be sold.[2]

It has been held that the right of pre-emption extends to agricultural estates and is not merely confined to urban properties or small plots of lands.[3] And though the right founded on the basis of vicinage has been limited by the Courts in this country

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[1] See *Moharaj Singh* v. *Lalla Beechuk Lall*, 3 W. R., 71

[2] *Zahar Ali* v *Nur Ali*, I L., 2 All., 90.

[3] *Karim Bukhsh* v. *Kumuruddin Ahmed*, 6 N. W., 377.

to parcels of land and houses,[1] such a right founded upon actual coparcenary has been held to apply to villages or large estates.[2]

In *Mahommed Hossein* v. *Mohsin Ali*, the Calcutta High Court distinctly laid down that though a neighbour could not, under the Mahommedan Law, claim a right of pre-emption in respect of a share in villages or large estates, a co-sharer undoubtedly could.[3]

The Calcutta High Court has held that when a Mahommedan co-owner of a property sells his share to a Hindu, his co-sharers have no right of pre-emption.[4] The reasoning of this decision is far-fetched and somewhat difficult to follow; and it has been expressly dissented from by the Allahabad High Court in *Brij Mohun Lall* v. *Abul Hassan Khan*, where they held that in a case where the pre-emptor and the vendor are Mahommedans, and the vendee a non-Mahommedan, the Mahommedan Law is to be applied to the matter in advertence to the terms of S. 21 of Act VI of 1871) (the Bengal Civil Courts Act). They added further, and it is submitted correctly, that though the Courts are not bound to administer the Mahommedan Law in claims for pre-emption, yet on grounds of equity that law had always been administered in respect of such claims as between Mahommedans, and it would not be equitable that persons who were not Mahommedans, but who had dealt with Mahommedans in respect of property, knowing the conditions and obligations under which the property was held, should, merely by reason that they were not themselves subject to the Mahommedan Law, be permitted to evade those conditions and obligations.

Section III.

Formalities necessary to establish the Right of Pre-emption.

The right of pre-emption is a *strictissimi juris*, and the formalities necessary to be performed, before the pre-emptor can lay his claim

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[1] *Abdul Azim* v. *Khundar Hamid Ali*, 8 B. L R., A. C., 63; *Ejnash Koer* v. *Amjad Ali*, 2 W. R., 261; *Chowdhry Joogul Kishore Singh* v. *Poocha Singh*, 8 W. R., 413.

[2] *Mohamed Hasan* v. *Mohsin Ali*, 6 B. L. R., 41, S. C., 14 W. R., F. B, 1; see *Ukhoy Ram Shahaji* v. *Ram Kant Row*, 15 W. R., 225.

[3] 6 B. L. R., 41, S. C., 14 W. R., F. B., 1. See also *Jehangir Bukhsh* v. *Lalla Bhikari Lall* (in review), 7 B. L R., 24.

[4] *Kudrutullah* v. *Mahani Mohun Shaha*, 4 B.. L. R. F. B.. 134.

to a property which has been sold to another, must be strictly complied with and the performance established.

In the first place, it is necessary that he should formulate his claim or his desire to assert his claim of pre-emption the moment he is informed of the sale. Any delay in the formulation of the claim will defeat his right of pre-emption in respect of the property.[1] No particular formula is necessary, so long as the claim is unequivocably asserted. As the presence of witnesses is not necessary at the formulation of this demand, the evidence regarding the performance of this preliminary formality generally rests on the evidence of the pre-emptor. This assertion is called *talab-i-mowasibat* or "immediate demand" and must be made, as already stated, immediately on receipt of the news of the sale. *Talab-i-mowásibat.*

But the demand must be made after the sale has been completed. If made whilst negociations are going on between the vendor and the vendee it is of no avail.

As already stated, it is not material in what words the claim is preferred; so long as they imply a claim they are sufficient. "Thus," says the *Hedâya*, "if a person were to say 'I have claimed my *shufâ*' or 'I shall claim my *shufâ*' or 'I do claim my *shufâ*,' all these are good, for it is the meaning and not the style or mode of expression which is here considered."

"Similarly, if he said 'I have demanded,' or 'I take the mansion by pre-emption,' or 'do demand pre-emption' it would be lawful."

But if he were to say to the purchaser 'I am thy *shafi*' or pre-emptor, it would be void. The reason of this distinction is evident, as a mere statement of a fact does not evince any desire on his part to avail himself of his right.

The next formality which must be gone through before the right can be established,[2] is the reiteration of the demand before witnesses either on the premises or property sold or in the presence of the vendor or the vendee. This is called the *talab-i-takrir wa-ish-hâd*, or, shortly, *talab-i-ish-hâd*, "demand by invocation of witnesses."[3] *Talab-i ishtish-hâd.*

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[1] Comp. I. L., 10 Cal., 383; I. L., 1 All., 283; 4, B. L. R., A C. ,216; but see 4 B. L. R., p. 203, where a short delay for "reflection" was allowed.

[2] 11 W. R., 307.

[3] 6 B. L R., 165.

This formality is insisted upon with the object of getting evidence of the fact that the pre-emptor has really asserted his right. It must be performed within a reasonable time and without any unnecessary delay after the first demand.[1] An unnecessary delay in the assertion of the second demand would defeat the claim. The question of time or delay is one of fact, and would depend on the circumstances of the particular case.

In order to perform this ceremony the pre-emptor must take some witnesses with him to the vendor, if the property sold be still in his possession, or to the vendee or to the property which is the subject-matter of the claim. And there, in the presence of the witnesses, he must say to the following effect: "such a person bought such a house (sufficiently indicating) of which I am the *shafi*; I have already claimed my right of *shufâ* and now again claim it, be therefore witness thereof."

These formalities may be observed by the claimant personally or by proxy.[3] The law requires that the performance of the ceremonies must be strictly established. But the course of decisions in this country has not been generally uniform in the application of the principle.

The right of pre-emption, even where customary, is, generally speaking, co-extensive with the rules of the Mussulman Law.[4] And unless it is proved that it is not customary to perform both the *talabs*, the party claiming the right of pre-emption is bound to comply with the requirements of the Mussulman Law. But where it is customary not to perform either of the two demands, even a Mahommedan pre-emptor is not bound to go through all the formalities.[5]

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[1] *Jaridan* v. *Latif Hossain*, 8 B L. R., 160.

[2] *Abadi Begum* v. *Imam Begum*, I. L, 1 All, p. 521; see also *Ojheeunissa Begum* v. *Rustam Ali*, W. R., 1864, p. 219; see also 4 B. L. R., A. C, 139; 6 B. L. R, p. 167, *note*.

[3] *Prokas Singh* v. *Jageswar Singh*, 2 B. L. R., A. C., 12; *Jadu Singh* v. *Rajkumar*, 4 B L R., A C., 171; *Ali Mohammed* v. *Taj Mohammed*, I. L., 1 All., 285; see also *Harihar Dub* v. *Sheo Proshad*, I L., 7 All, 41.

[4] *Ramdular Misser* v. *Jhumak Lall Misser*, 8 B. L. R., p. 455, S C.; 17 W. R. p. 265; *Gordhun Das Girdhurbhai* v. *Darankar*, 6 Bom., A. C., p. 263.

[5] *Fakir Rawat* v. *Emam Bukhsh*, B. L. R, Sup. Vol., p. 35; S. C., W. R., F. B, 143.

It has been sometimes held[1] that the demand must be in the form given in the *Hedâya*, but that does not seem to be a correct view of the law; what the law requires is that the demand must be to that effect and no more.

But the *talab-i-ishtish-hâd* may be combined with the *talab-i-mowâsibat*, *e.g.*, if at the time of the *talab-i-mowâsibat*, the pre-emptor had an opportunity of invoking witnesses in the presence of the seller or the purchaser or on the premises to attest the immediate demand, it would suffice for both demands, and there would be no necessity for the second.[2]

The pre-emptor must offer to pay the same price as the purchaser, and to take the property on the same terms.

If the property was sold for a price payable at a distant period, the claimant may either wait until then to pay the price and take the property, or he may pay it immediately and take the property at once, but unless the vendor had given any time to the purchaser for the payment of the price, the pre-emptor cannot claim any respite therefor.

If a house has been sold in exchange for goods or effects, the pre-emptor is entitled to take it for the value of such effects "for effects are amongst the things denominated *zât-ul-Kayim* or things which being estimable are compensable by an equivalent in money." If, on the other hand, a man sells a house for compensation in wheat, silver or any other article estimable by measure or weight, the *shafi* may take it for an equal quantity of the same article, because these are of the class of *zât-ul-Imsâl* or things compensable by an equal quantity of the same species.

If a piece of land is exchanged for another piece, the pre-emptor of each piece would be entitled to take it for the value of the other land being of the class of *zât-ul-Kayim* or things compensable by an equivalent in money."

If the property has changed hands and is in the possession of the vendee, the pre-emptor must take it on the price stated by the purchaser to have been paid by him.

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[1] 4 B. L. R., A. C., 171; but see 8 B. L. R., 455.

[2] Comp. 4 B. L R., A. C, p. 139; 6 C L. R., p. 166; *Nundo Pershad Thakur* v. *Gopal Thakur*, I. L., 10 Cal., 1008.

It is otherwise if the property is still in the hands of the vendor; in such a case the consideration mentioned by him should be paid by the pre-emptor.

Any abatement in the price made by the vendor in favour of the purchaser would accrue to the benefit of the pre-emptor. But should the vendor after the conclusion of the sale remit the whole of the price to the vendee, the pre-emptor would not be allowed to avail himself of the remission.

The reason of the distinction is that an abatement in the price is connected with the original bargain or sale and the pre-emptor is therefore entitled to claim its benefit, whilst an entire remission is unconnected with the transaction, and is more in the nature of a subsequent gift.

Should the vendee, after the bargain is concluded, agree to an augmentation of the price in favour of the seller, the pre-emptor would not be liable for such increase, for his right is founded on the original contract.

Similarly, if a house be sold for one price and afterwards another contract be made in respect of the same house with the same purchaser settling a larger price, the pre-emptor is not prejudiced by such augmentation, but is entitled to his right of pre-emption for the price first agreed upon.

Under the Mussulman Law there is no fixed period within which a pre-emptor whose claim is not acceded to, may prefer his claim called *talab-i-Khusûmat* or *talab-i-Tamlik* in Court, but the Limitation Act provides a period of a year.

If a suit is not brought within that period, the claim would be barred.

SECTION IV.

THE PROCEEDING IN COURT.

The pre-emptor is not bound to produce or tender the price during the pendency of his suit. It is necessary, however, that he should tender the price to the buyer or deposit it in Court when once the decree has been made in his favour. But a delay in the payment of the price does not defeat the right which under the decree has become vested in the pre-emptor. It is usual, however, for the Courts of Justice in this country to fix a period of time within which the price should be paid. If not so paid the right drops.

The buyer is entitled to retain the property in spite of any decree in favour of the pre-emptor until he has received the price.

When two or more persons are entitled to the right of pre-emption in a particular property, each one of them can claim the property in its entirety. But when a decree has been made in favour of two and one of them gives up his share, or even if without a decree, one of the two pre-emptors surrenders his right after taking possession of the property, the other does not become entitled to the share so given up or surrendered. In other words, before the right has become effectuated by actual delivery of the property by the buyer to the pre-emptor, or by the decree of the Judge, each of several pre-emptors has a right to the whole, and a waiver by one gives to the other a right to the whole. But after the right has effectuated as above, each one has a separate interest and can surrender it to the buyer if he pleases, without giving any right to his co-pre-emptors.

When a decree is made in favour of one who is entitled to the right of pre-emption in the second or third degree and subsequent thereto a person with a superior claim asserts his right, the latter would be entitled to a decree for the whole by cancellation of the first.

The pre-emptor has the option of inspection even after decree by Judge. "If the Kâzi," says the *Hedâya*, "were to make a decree in favour of the pre-emptor before he has seen the property in dispute the pre-emptor has an option of inspection, and if any defect be afterwards discovered in it he has an option from defect, and may, if he please, reject it notwithstanding the purchaser should have excepted such defect from the bargain, or, in other words should have exempted the seller from responsibility for such defect." "Because as the transfer of property by right of *shufâ* is the same as a transfer of property by sale, the *shafi* has therefore under both the above circumstances the power of rejection in the same manner as any other stranger, and this power in the *shafi* is not destroyed by the purchaser having seen the property or having so exempted the seller, for he (the purchaser) was not deputed by the *shafi*, and his act of course does not affect."

If the buyer has made any improvements in the property the pre-emptor must either pay their value or cause them to be removed. But if he has grown a crop on the land, the pre-emptor must wait for its ripening, after which he will take the land at the full price.

Should the buyer erect buildings or plant trees upon the land and a decree is made for the land, the pre-emptor has the option of taking the land together with the building or trees, paying the value of both or compelling the purchaser to remove them.

When the property which forms the subject-matter of dispute deteriorates in the hands of the purchaser the claimant is entitled to a proportionate deduction in the price, unless the deterioration has not been caused by the purchaser, in which case the pre-emptor must either pay the whole price or resign his claim.

If the purchaser wilfully break down any buildings or structure, the pre-emptor may either resign his claim or may take the area of ground for a proportionate part of the original price, but he is not entitled to the materials because they form now a separate property, and are no longer appendages of the ground, and the right of *shufâ* extends only to the ground and to things so attached to it as to be appendages.

When any portion of a house or garden is destroyed by accident or natural causes, the pre-emptor has the option of either resigning the whole or taking it paying the full price. It is otherwise with land, and if a portion thereof is diluviated the pre-emptor may take the remainder, paying a proportionate price therefor. The reason of this distinction is said to be that a house or garden are mere appendages to land, whereas land is the real subject to which a right of pre-emption appertains.

When a person after his purchase pulls down the buildings, the price is to be divided according to the value of the buildings as they were while standing and the value of the cleared space, and the pre-emptor is to take the land at so much of the price as corresponds to the latter.

If the buildings are burnt down or swept away by an inundation so as to leave nothing in the hands of the purchaser, the pre-emptor must take the site at the full price.

Any intermediate dealing by the buyer with the property is voidable at the instance of the pre-emptor, for example, if the purchaser disposes of the subject of the claim, such sale is void so far as the pre-emptor is concerned. If the pre-emptor has, after obtaining possession of the property, made any improvements in it by erecting buildings, planting trees and so forth, and then if it be proved that the land belonged to some person other than the

vendor or vendee, in such a case the pre-emptor is entitled to recover back the price paid by him from whomsoever he had taken the property; and is at liberty to remove what was done by him upon the property or land in question but he cannot recover from either party the value of the improvements made by him.

The right of pre-emption may be relinquished either expressly or impliedly, or it may be destroyed by operation of law, for example, by the death of the person claiming the right.

The pre-emptor may expressly forego the right of pre-emption, with or without any compensation.

Implied relinquishment depends upon inferences deducible from his conduct. If he omits without any sufficient cause to perform the demands after learning of the sale, the inference is that he has abandoned his right; and the law therefore holds that such omission avoids the right. Acquiescence in the sale either by offering to purchase from the buyer the property sold, or by asking him if he would give it up to him, or by taking it from him on hire, amounts in law to a relinquishment.[1] But these acts have that result only when they are done with the knowledge of the sale.

The right of pre-emption is rendered void by operation of law when the pre-emptor dies after making the necessary demands, but before he has taken over the property which forms the subject-matter of dispute, or before he has obtained a decree therefor from the Kâzi. But it is not rendered void by the death of the purchaser, and the pre-emptor can, therefore, assert his right and take the property from his heirs.

According to the Shafeïs and the Shiahs the right of pre-emption is a heritable right and devolves upon the heirs of the pre-emptor.

The pre-emptor has no right to divide the property sold or take one part and reject another part. He must abide by the bargain as a whole. He must, therefore, take or leave the whole whether the purchase be by one person from one or by one from two or more. But where a property is purchased by several persons the pre-emptor may take the whole or the portion of any of them.

When the person claiming the right of pre-emption sells previous to the decree of the Kâzi, the property upon which his right is founded, that right becomes extinguished.

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[1] See *Habib-un-nissa* v. *Barkat Ali*, I. L., 7 Alla., 275.

When the pre-emptor has different rights of pre-emption, the extinction of one does not affect the other, and therefore when he is both a partner and a neighbour, and he sells his share on which his right in the former capacity is founded, he may still assert his claim on the ground of neighbourhood.

Where the right had been relinquished upon misinformation of the amount, or the kind of price, or of the purchaser, or of the property sold, the pre-emptor can assert the right on being informed of the true facts. For example, if he relinquished his right on being informed that the price was 1000 dirhems, whereas in reality the price was less, he may, on coming to know of the truth, still assert his right.[1] Nor does relinquishment in favour of one operate in favour of another. For example, if the pre-emptor on learning that *A* is the purchaser, waive his right, he can, on subsequently learning that the purchaser is in reality *B*, assert his title.

If the pre-emptor act as an agent of the vendor in the transaction he has no right of pre-emption; it is otherwise if he acts as an agent for the purchaser.

When a man purchases from one by a single bargain several houses in a street in which there is no thoroughfare and the pre-emptor desires to take one of them, if his right of pre-emption is based on partnership in the right of way, he cannot take a part of the purchased property, for this would be to divide the bargain without any necessity;[2] but if the right be based on neighbourhood and he is neighbour only to the house which he wishes to take, he may lawfully take that alone.[3]

When the purchased property consists of several parts, each separate and distinct from the other, as for instance when two houses are purchased by one bargain, the pre-emptor cannot take one of them without the other if he is pre-emptor of the two together. He must either take or leave both, whether the houses are adjacent to or separated from each other, and whether they are situate in one or two cities. Abû Hanîfa and his disciples are agreed on this point

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[1] Comp. *Abadi Begum* v. *Imami Begum*, I. L., 1 Alla., p. 521; and *Bhairon Sing* v. *Lalmon*, I. L., 7 Alla., p 23

[2] Comp. *Caree Ali* v. *Mussutullah*, 2 W. R., 28; *Sardhari Lal* v. *Lopoo Modi*, 25 W. R., 500; and *Durga Persad* v. *Mami*, I. L., 6 Alla., 423, and the other cases referred to there.

[3] *Roushan Koer* v. *Ram Dial Roy*, 13 Cal. L. R., 45.

Where a minor is entitled to a right of pre-emption, his guardian may abandon the right if he consider it necessary.

The law allows certain devices for the evasion of the right of pre-emption, *e.g.*, where a man sells the whole of his house excepting only the breadth of one yard extending alongside the house of the pre-emptor, the latter is not in this case entitled to claim the right of pre-emption, because he is no more a neighbour. Similarly, if the vendor were to grant the intervening part of his house as a free gift to the purchaser and put him in possession.

CHAPTER XXVI.

THE SHIAH LAW OF PRE-EMPTION.

THERE is great divergence between the Shiahs and the Hanafîs with regard to the persons who may claim the right of pre-emption. But the Hanafî Law, which was introduced in this country by the Mussulman Government, has become the territorial or the customary law as the case may be, in places where the right of pre-emption is recognised. And therefore a Shiah, though he may not be entitled under his own law, to claim pre-emption by virtue of neighbourhood, would be entitled to do so by virtue of the customary law. Still, a study of the Shiah Law is not without value.

According to the Shiahs, only a partner in the property sold can claim the property by right of pre-emption, and there is no right of pre-emption when there are several sharers, and one of them only sells his share.[1] Some legists, however, are of opinion that even where there are more than two partners and one sells his share, a right of pre-emption arises in favour of the other co-sharers.

It is not necessary, however, that the person claiming the right of pre-emption should be a partner in the substance of the thing. So long as he has an existing interest of a substantial nature which is likely to be interfered with or disturbed by the introduction of a stranger, the law will recognise the right. For example, if two persons hold two tenements separately, but have a pathway or road or watercourse in joint enjoyment by virtue of their holdings, either of them will have a right in respect of the other's tenement.

A man who has only an easement over another's property and a mere neighbour has no right to claim the property in question in preference to a third person. If the easement is one of right or has vested by operation of law, it will not be interfered with by the purchaser, and no inconvenience can accrue to the holder

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[1] See *Dami* v. *Ashasha Bibee*, 2 N. W., 360.

of the dominant tenement; so also in the case of a neighbour, no question of inconvenience can arise.

When the person entitled to claim a property by right of pre-emption is not *sui juris*, being either under age or *non compos mentis*, his guardian should exercise the right on his behalf, provided the same be for the advantage of the ward.

Failure on the part of the guardian to make the demand would not extinguish the right of the person entitled; and should the guardian abandon the claim, the minor on attaining puberty, and the insane person on recovering his reason, may still assert it.

A person who was absent at the time of sale, is entitled to prefer his claim, however prolonged his absence might be, in case he was during his absence unable to prosecute it in person or through an agent.

A sick person, or one who is undergoing imprisonment and therefore unable to prefer his claim, stands in the same position as one who is absent.

According to the Shiah Law, the right of pre-emption comes into operation immediately on the conclusion of the contract, and not merely on the completion of the transfer.

As in the Hanafî Law, the pre-emptor must take the whole property or abandon the whole, he cannot split up the contract in his favour.

He must take at the contract price, whether the real value of the share be more or less, without being liable for incidental expenses.

If the purchaser add something to the price after (completion of) the contract and expiration of the period of option, such addition is not an augmentation of the price, but a gift, and the pre-emptor will not be liable for it.

If, however, the augmentation is made during the period of option, the Shaikh has declared that it constitutes a part of the original price and stands on the same footing as if it had been stipulated in the contract; but "this opinion," says the author of the *Sharâya*, "is attended with some difficulty as being inconsistent with what has been already said of the transfer being completed by the contract."

In like manner, if the seller should make any abatement from the price, such abatement is unconnected with the contract, and the purchaser is by no means bound to surrender the share until he has received the full price settled at the making of the contract.

If a person were to purchase a property in exchange for a jewel or such like article, the pre-emptor may take the property at its value at the time of the contract, which must be properly appraised.

The pre-emptor should prefer his claim as soon as he is informed of the contract. Unavoidable delay caused by absence, illness or incarceration preventing his preferring the claim through an agent, does not lead to the extinction of the right.

Similarly, if the delay is owing to his having been wrongly informed of the amount or kind of price, his right does not drop.

He must use due diligence in prosecuting his claim. For example, when travelling with that intent, he is not obliged to use greater expedition in his journey than is habitual to himself. Further, should he be engaged in the performance of any religious duty, whether indispensable or discretionary, he is not obliged to break it off, but may lawfully wait till it is completed. In like manner, if the time of prayer is at hand, he may wait till he has purified himself, and perform his devotion without hurry or restraint.

Neglect on the part of a person, who receives intelligence of a sale whilst on a journey and unable to prefer his claim by personally appearing or appointing an agent to call upon witnesses to attest his intention to demand it, does not extinguish his right. But when he is in a position to assert his claim either in person or by appointing an agent and neglects to do so, his right is entirely lost. Should the vendor and vendee agree to rescind the contract that would not destroy the right of the pre-emptor, and he may, despite such rescission, claim to have the property conveyed to him.

As under the Hanafî Law acquiescence in the sale either express or implied will extinguish the right.

No dealing by the vendee would affect the right of the pre-emptor, and if he sells the subject of the claim to a third person, the pre-emptor would be entitled to take it from him.

The pre-emptor's right is against the vendee, and he takes the property from him and not from the vendor, but if the property continues in the hands of the latter, he may take it from him, though the responsibility rests upon the vendee.

If the subject of sale should perish or become damaged without any act on the part of the purchaser, or by his act but before it was demanded by the *shafî*, in that case it is optional with the latter to take the property at the full price, or abandon it entirely, and in

the event of his taking it, he is entitled to all the ruins or fragments that remain, whether they are still on the spot or have been removed from it.

If, on the other hand, the property has become injured or has deteriorated owing to some act of the purchaser after demand made by the pre-emptor, the purchaser is responsible.

If the vendee should, before any demand has been made, plant trees or erect buildings upon the land, he is entitled at his option to take up the trees or remove his buildings without levelling the ground, while it is optional with the pre-emptor to take it at the full price, or to relinquish his right absolutely.

If, again, the vendee should decline to remove the trees or buildings, the pre-emptor has three courses open to him, *viz.*, he may either remove them himself, paying the purchaser compensation for any loss he may sustain thereby, or he may take possession of the whole, paying in addition to the price the value of the trees or buildings which thus become his property with the consent of the purchaser, or he may abandon his claim altogether.

If the subject of the claim should increase in such a manner that the increase is connected with and forms part of it, the accretion would belong to the pre-emptor, but if the accretion is separable from the *corpus*, it would belong to the vendee.

If a person should sell his share in two houses, and the pre-emptor is a partner in both, he may lawfully take or abandon both, or he may take one and forego his claim in respect to the other. But in the case of a single mansion he cannot forego his claim to a part.

If the sale is in the nature of an exchange, the price being a specific article, and it turns out to be the property of some person other than the vendee, as the sale is null, there is no right of pre-emption. But if the price was fixed in some commodity estimable by weight or measure as wheat or grain or corn, the right would be fully established, even though the articles in question should turn out to be the property of another person.

If the subject of the sale should appear to be defective, and the vendee in consequence thereof should receive a compensation for the defect, the pre-emptor is entitled to a deduction in the price. But should the vendee keep the subject of the sale without seeking any compensation for the defect, the pre-emptor must either take it at the full price, or abandon his claim together. Should the

pre-emptor abandon his claim upon being informed that there are two vendees, and it then appear that there was only one, or if he was informed that there was only one vendee, and it turns out that there were two, or if he was told that the purchaser bought for himself, and it afterwards appear that he bought for another, in all these cases the right is not lost.

The Shiahs agree with the Shâfeïs in holding that the right of pre-emption devolves by inheritance upon the heirs of the pre-emptor, so that if he should die leaving a widow and a child, an eighth of it goes to the widow and the remainder to the child.

And if one heir should relinquish his share of the right, it would not drop or be extinguished, but the other might take the whole.

The right of pre-emption attaches only to immovable property. With respect to trees and buildings, the right of pre-emption is established if they are sold as appendages of the ground on which they stand.

The right of pre-emption is established with respect to rivulets, ways, baths, &c., provided the division thereof would not occasion a loss or damage such as to render the property useless.

By damage "we" understand such injury as would render the property useless after division, in which case the person who would be injured cannot be compelled to make a partition.

Where, again, the bath or way or rivulet is of such a character that its utility would not be destroyed by division, the co-owner may be compelled to admit of a partition, and (if he should sell his share) the right of pre-emption would have effect in favour of his partner.

If a person should sell a piece of land which is his exclusive property and with it his share in another joint tenement by one bargain, the right of pre-emption attaches to the share exclusively at the due proportion of the price.

It is an indispensable condition for the operation of the right of pre-emption that the share of the property should have been transferred by sale. If the share has been assigned as a dower or given in charity or bestowed by way of gift or in composition for a claim it is not subject to the claim of preemption.

If a mansion should be partly *wakf* and partly free, and the portion which is free be sold, the beneficiaries of the *wakf* have no right of pre-emption. The author of the *Jawâhir* says, however, that "a right would be established."

When the *shafi* has taken possession of the property and discovered therein a defect which existed prior to the sale, then if both he and the (intermediate) purchaser were aware of the defect neither of them has any option (in the matter); but if they were both ignorant of the defect, and the *shafi* returns the property to the purchaser, the latter has an option either to reject the sale altogether, or to demand a compensation for the defect from the seller.

If, however, the *shafi* should elect to retain the property, the purchaser has in that case no right to cancel the sale because the share has passed out of his hands.

So also if the pre-emptor was acquainted with the defect and not the purchaser. But if the purchaser was apprized of it and not the pre-emptor, the latter only would have the right of rejection.

There are devices for defeating the right of pre-emptor, two of which are the following :—

The property may be sold for a price above its value, and then something of trifling value may be received in exchange for it, which would compel the pre-emptor to pay the full price if he chooses to avail himself of his privilege.

In like manner, if the property is sold at an excessive price, and the seller receives part of it giving a release for the remainder, this also obliges the pre-emptor either to submit to a considerable loss, or to abandon his claim.

CHAPTER XXVII.

SECTION I.

BAILMENT.

BAILMENT under the Mahommedan Law is a contract by which one person entrusts to another a certain thing for a determinate or indeterminate period, or for a specific purpose without consideration. If consideration is agreed upon, it may be made payable either at stated periods or on the completion of the work, or on the return to the bailor of the thing bailed. It may be even payable in advance.

There is no special word in the Mahommedan Law to convey the general meaning of the term bailment, but it is treated under the several heads according to the purpose for which the thing is bailed, *e.g.* (1) *Aâriat* or commodate loan; (2) *Ijâra* or hire, which includes all kinds of specific bailment; (3) *Wadiat* or deposits; (4) *Rahn* or pawns and so on.

I shall deal briefly with the subject of specific bailment in this chapter, touching on the subject of *Aâriat* only slightly to indicate the analogy existing between the Mussulman Law and the English Common Law.

SECTION II.

IJARA.

When a person has been let into the occupation of a house or land, he is bound to pay the stipulated rent, even although he should not reside in or make use of it, because as it is impossible to make delivery of the usufruct, the delivery of the subject from which the usufruct is derived is a substitute for it, since in delivering the article an ability to enjoy the usufruct is established.

But when no hire is agreed upon, and the bailment is not gratuitous, the tenant is liable for the customary rent.

But if after obtaining possession of the subject of hire, he was to lose possession by some wrongful act of a third person, the tenant is no longer responsible for the rent.

If it be not otherwise specified in the contract, rent may be demanded from day to day and upon the hire of an animal (upon a journey) from stage to stage.

But a workman who is entrusted with a job is not entitled to his recompense until his work is finished.

Where an article has been bailed to another for some specific purpose upon a stipulated consideration, the bailee has a lien upon the article bailed for the price; for example, a baker hired to bake bread may detain the bread until his hire has been paid. So also a tailor may detain the clothes prepared by him.

The bailee is not responsible in case of accident during such detention.

But where the work is of such a nature that it does not produce any visible effect in the article, it cannot be detained.

Where the bailment is special, the bailee cannot entrust the article to any other. For example, if a book be given to *A* to be copied by him especially, he cannot give it to another for that purpose.

Where the contract is unqualified or absolute, the bailee is at liberty to give the use of the article to any person. The hire of an animal is lawful, either for carriage or for riding. If, therefore, the riding be absolutely expressed, the hirer is at liberty to permit any person he pleases to ride upon the animal. In the same manner also, if a person hire a dress for the purpose of wearing it unrestrictedly and in an absolute manner, he is at liberty either to wear it himself or to give it to any other person to wear.

But in a restricted contract, any deviation with respect to the use renders the bailee responsible for the article bailed, unless it be of a nature not liable to injury from such deviation. "Land, however, and every other article not liable to be differently affected by a different occupant (such as a tent or pavilion) is not restricted in point of use by the mention of a particular person, and consequently the hirer is at liberty to put any one to reside in it that he pleases, since the exclusive restriction is of use only because of its preventing a difference of effect."

Where the nature of the use to be made of the thing bailed is

specified in the contract, the bailee cannot deviate therefrom. "If a person were to hire an animal to carry a burden and the person who lets it were to specify the nature and quantity of the article with which the hirer is to load the animal, such as five bags of wheat, the hirer in this case is at liberty to load the animal with an equal quantity of any article not more troublesome or prejudicial in the carriage than wheat, such as barley or rapeseed, as all articles of that description are included in the permission contained in the contract. The hirer, however, is not at liberty to load the animal with any article of a more prejudicial nature in the carriage than wheat, such as salt, &c., as this would be in violation of the contract between the bailor and the bailee."

Nor would a person who has hired an animal to carry a certain quantity of cotton be at liberty to load the animal with a similar quantity of iron, since it is highly probable that the carriage of the iron may be more prejudicial to the animal than the carriage of the cotton.

Where the bailee uses the article beyond that specified, he incurs a proportionate liability in case of accident, *e.g.*, a rider taking up an additional rider, incurs responsibility for half the value of the animal. And where a hired animal perishes from ill-usage, the hirer is liable for its value.

Where an animal is hired or borrowed for a specific journey, any deviation therefrom induces responsibility.

The change of a saddle for another of the same sort does not give rise to a liability, unless the weight be different, when responsibility attaches in proportion to the excess. But if the nature of the saddle be different, responsibility attaches *in toto*.

A person employed to carry a burden does not incur any liability by any immaterial deviation from the prescribed road.

Where land is hired for cultivation any injurious mode of dealing with it gives rise to a proportionate responsibility.

A tailor is responsible for deviating from his orders.

An invalid condition attached to a contract of bailment avoids it altogether.

An indefinite thing may be bailed lawfully, *e.g.*, a person may let his share or portion in a house.

Responsibility does not attach from the customary use of an article under an indefinite contract.

Bailees are generally divided into two classes, common or particular.

A common bailee is one to whom an article is bailed in the ordinary course of his work.

A particular bailee is one to whom an article is entrusted not by virtue of his calling, but upon a special contract.

The article committed to a common bailee is a deposit in his hands. If the article should perish whilst in his possession he is responsible for its loss, unless it is lost or destroyed by any irremediable and irresistible accident, such as a fire burning down his house, or robbers, who could not be repelled, taking it away forcibly. But when the article is lost from any cause which might have been avoided, such as usurpation or theft, it would amount to negligence and the bailee would be responsible, in the same manner as a trustee who lets to hire the deposit in his hands.

A surgeon or farrier, acting agreeably to customary practice, is not responsible in case of accident.

The liabilities of a particular bailee are governed by the contract.

A gratuitous bailee incurs no responsibility beyond taking ordinary care of the article entrusted to his charge.

SECTION III.

AARIAT OR COMMODATUM.

"In the language of law," says the *Fatâwa Alamgiri*, "*aâriat* means the constituting a person, the owner of the usufruct of a property without consideration. This is according to Abû Bakr Râzi and the universality of our masters, and it is correct as stated in the *Sirâj-ul-Wahâj*."

"Its essential is the consent of the giver of the loan, the consent of the bailee not being necessary. This is the opinion of our three masters" [*viz.*, Abû Hanîfa, Abû Yusuf and Mohammed].

"The consent of the bailor may be given in these words, 'I have given this to thee by way of *aâriat*,' or 'I have given this cloth or house for thee,' or 'this slave for thy service,' or 'this beast for carrying thy burden,' or 'this land is for thy sustenance'; if there is no intention of making a *hiba*, all these will constitute an *aâriat*."

"Similarly if he were to say 'this house is a *Sukna* (abode) for thee' or '*Umra Sukna* (abode for life)'; so it is stated in the *Badâya*."

"In reality it [*aâriat*] is the giving to another the usufruct

of a thing which is not liable to destruction in the use of it for a period of time, either determinate or indeterminate."

"Understanding is a condition but not puberty, and accordingly a boy who has been authorised by the Kâzi to engage in trade may lawfully give a thing in *aâriat*."

"It is also a condition that the thing is capable of being used without being destroyed; but if liable to be consumed, its *aâriat* is not lawful. So it is stated in the *Budâya*."

"In the *Kitâb-ul-Kâfi* it is stated from Hâkim Shâhîd that the *aâriat* of *dirhems* and *dinars* is a loan; and so of all articles that are capable of being weighed or measured.....But when *dirhems* and *dinars* are borrowed for being used as weights or ornaments, then they form the subject of an *aâriat*. And it is not valid to derive any benefit from the subject of an *aâriat* than is bargained for. So it is stated in the *Ghâit-ul-Bayân*."

"There are several kinds of *aâriat*, (1) where the period as well as the mode in which profit may be derived from it is left indeterminate, in which case the bailee may use it as he likes, and whenever he likes; (2) where both the period and the mode of user are expressly fixed, the bailee cannot contravene the conditions, unless for the safety of the thing bailed; (3) where the period is fixed and not the mode of user; and (4) where the mode of user is fixed, but not the period.

Its legal effect is that the bailee is entitled to the use or usufruct of the thing bailed without having to pay any compensation therefor.

"The subject of *aâriat* is a trust. If it is lost or destroyed without the neglect or default of the bailee, he is not liable. There is a difference among 'our' jurists as to the validity of a condition by which the bailee has bound himself for any loss to which he has not contributed by his neglect or default. Some jurists have held such condition to be valid; others not."

But when he has contributed to its loss, he is liable by *consensus*. For example, if he has knowingly used a beast of burden by day or night in work for which it is unfitted, he would be liable for its loss.

The rules relating to the liability of a person who has taken a thing on *aâriat*, and other matters connected therewith, are minutely laid down in the *Fatâwa Alamgiri*, but it is unnecessary to go into them here, as the Indian Contract Act is applicable to all those questions.

APPENDIX.

SHIAH LAW RELATING TO WAKF.

Ghunia.

"For the validity of a *wakf* several conditions are necessary. Some of them are the following :—That the *wâkif* is the owner of the property, and that he possesses the capacity of disposition. If the *wâkif* is under inhibition from insolvency the *wakf* is not valid."

"It is also necessary that the *wakf* should be express in terms ; and that an approach to Almighty God should be intended therefrom."

"The express terms [for the constitution of *wakf*] are *wakfto*, *habasto* or *sabalto*, 'I have consecrated' 'I have tied up' or 'I have given in the way [of the Lord].' If he says *tassadukto*, it is capable of two interpretations. Such is the case with '*haramto*' and *abadato*."

"It is also necessary that the subject of the *wakf* should be *maalum* (known), capable of being delivered, and of yielding profit, retaining its existence [for ever]. By consensus both movable as well as immovable property, *mushâa* as well as separated property are equal [that is, a *wakf* of these is equally valid]."……

"And as to [the validity of] *wakf* of *mushâa* [the proof is] that the Prophet [may the blessings, &c.] told Omar (may God be pleased with him) with respect of his share of the lands of *Khaibar* 'tie up the substance (*asl*) and give its usufruct in the way of the Lord,' although the shares of *Khaibar* were *mushâa*, and had not been partitioned by the Prophet (may the blessings, &c., but were [only] specified."

"And the majority hold that a *wakf* of *dirhems* and *dinars* is not lawful, for profit cannot be derived from them whilst retaining their substance in existence." [This view does not militate with

that taken by the later jurists that when profit can be derived by investment of money in trade or commere, the *wakf* thereof is lawful. The view here stated only refers to a case of *wakf* of money to be retained in specie.]

"Another condition is that the *moukoof-aliah* be different from the *wâkif*; accordingly if a *wakf* is made upon one's self it is not valid." [Here lies the principal point of difference between the *Shiahs* and the *Hanafis*.]

"But there is a difference of opinion" [on this point].

"When a *wakf* is made in favour of a generality of *Mussulmans*, in such a case without any difference of opinion, the *wâkif* may participate in its benefits."……

"Another condition is that the object of the *wakf* is known and capable of identification, and a *wakf* upon it would obtain the approval of the Deity."……

"And without difference of opinion a [commencement in] *wakf* cannot be made on a child *en ventre sa mère* or a slave."

"But a *wakf* on children who are in existence and descendants to be born afterwards is valid by *consensus*."……

[In other words, a beginning must be made with an object in existence.]

"A *wakf* on masjids, bridges, &c. is valid, for from those objects good accrues to all Moslems."

"Another condition is that the *wakf* should be perpetual. So that if a person were to say I have made this *wakf* for a year, it will not be valid."

"It is also, necessary that the property should be transferred to the beneficiaries or to some person on their behalf."……

"When all these conditions are found in a *wakf*, the right of the *wâkif* becomes extinguished for ever; and he cannot revoke it nor alter in any way the purpose or purposes to which he has made the consecration."……

"Among 'us' the beneficiaries may lawfully sell the subject of the *wakf* [only] where no profit is derived from it, and there is risk of its being ruined or destroyed."

"The directions laid down by the *wâkif* for the application of the usufruct must be carried out."

"When a *wakf* is made in favour of *awlâd* (children), and the *awlâd* of the *awlâd*, in such a case by consensus, the children of

daughters will be included, for, etymologically as well as legally the term *walad* is applicable to daughter.

"When a man makes a *wakf* on his *nasl* (posterity) or *akab* or *zurriat* in such a case, *nasab* will be recognised through the mother," [that is all persons tracing their descent to the *wâkif* on their mother's sides will be included in the benefit of the *wakf*].

"If the *wakf* is in favour of one's *itrat*, it is equivalent to saying that is for his descendants."……

"If the *wakf* is in favour of one's neighbour, and they are not named, then all persons residing on all sides within the space of forty yards in the neighbourhood of the *wâkif's* house will be included in that *wakf*. This is by consensus."

"If the *wakf* is for a beneficial purpose, but the term beneficial is *bâtil* regarding it [that is, if the purpose is *not* beneficial], or when the beneficiaries of the *wakf* have become extinct, in such cases, the *wakf* will be applied to purposes of benevolence (*wujuh-ul-khair*). Some have said that the *wakf* will revert to the heir's [of the *wâkif*], but the former [opinion] is the most approved."

Kitâb-ul Intisâr.

"The *Imâmias* are alone in holding that when the [subject of a] *wakf* has became ruined and it is not possible to derive any profit from it, in such a case the beneficiaries may sell it and derive benefit from its price."

Nihâya (Shaikh).

"Whatever property a man possesses, a *wakf* thereof is lawful, whether it be held jointly or separated."

"It is necessary that a *wakf* should be perpetual. To make it for a period is not lawful."

[If it is made for a period it would take effect as an *umra* or *hubs*. Under the Hanafi Law limited estates not being recognised, a *wakf* for a period takes effect as a perpetual *wakf*.]

"A *wakf* is not valid on an object that is not in existence."[1] [And this again is different from the Hanafi Law]. But if commencement is made with an existing object the *wakf* may be continued for objects not in existence.

[1] That is, if commencement is made with children in existence, the *wâkif* may lawfully include his after-born children, as well as the progeny of his children who are not in existence yet.

"But when a man has made a *wakf* for his children, although they are infants, he may lawfully include the progeny that may be vouchsafed to them."

"He may also include his own subsequently born children."

"When a man has made a *wakf* in favour of his *awlâd*, and they are both males and females, in such case if he has given preference to one over the other, his condition should be regarded. But if he has not mentioned anything about it, in that case the male and female among his children and children's children will share equally, for the term *walad* includes all. But if he says they will take according to the Book of God, the male will take double the share of a female."

A *wakf* for the *Kauba*, mosques and *mashâhid* [Mausolea of the Imâms] or for the general good of the residents of a particular locality is an approach to the Deity and lawful."

"The subject of the *wakf* can never be sold or given in *hiba* or in charity. But when the *wakf* is in imminent danger of being destroyed, or if the beneficiaries are in such emergent need that the sale of the *wakf* is absolutety beneficial for them, or if serious disputes have arisen among the beneficiaries, the property may be sold and the proceeds applied in the same way as directed by the *wâkif*. [This will presumably be done under the directions of the Judge.] But in no other circumstance, the sale of a *wakf* is lawful."

HANAFI LAW RELATING TO WAKF.

Kinia't-ul-Munia.[1]

By Mukhtâr bin Mahmud bin Mohammed az-Zâhidi, *al-Imâm-ul-ulâma* (the Imâm of the learned), styled *Najm-ud-din*; d. 658 (A. C. 1259) A. H. commentary on the *Nafis-al-Kudûri*.

"When a *wakf* is made upon children and children's children, males and females are equally entitled therein." P. 198.

"In the *wakf* of Hillâl [it is stated] *wakf* may be of three kinds, one kind being *wakfs* for the poor exclusively, another kind being for the affluent and *after* them for the poor; and the third being for the rich and poor alike, such as *rubâts*, *khâns*, cemeteries,

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[1] A work of great authority in India, see Morley's Dig. Introd. p. cclxxxvi.

mosques, aqueducts, bridges, &c., for both rich and poor have their needs attached to such objects." P. 201.

"When the *wâkif* appoints a *mutwalli*, the latter cannot discharge himself by saying, 'I have discharged myself,' *i.e.* cannot discharge himself *suo motu*, but he must ask the *wâkif* or the Kâzi to discharge him, who will thereupon remove him." P. 209.

Allâmah-at-Tahtâwi's *Commentary on the Durr-ul Mukhtâr*.[1]

"Imâm Shâei (may God be pleased with him) says: it is established that the Prophet (may the blessings of God be with him) dedicated several houses in Medîna. ..... which are still in existence; and the *Râshidin* Caliphs (the first four Caliphs) and others of the Companions [of the Prophet] made *wakfs*. So also it is laid down in the *Asaâf*." Vol. II, p. 528.

"In the *Bahr-ur-Râik*, it is laid down, as will appear more clearly afterwards, that the universality of [*Hanafi*] Jurists give *Fatwas* according to Abû Yusuf; only some few have followed Mohammed, but no one has followed the *Imâm* [*viz.*, Abû Hanîfa]." *Ibid.*

"Abû Yusuf holds the mere use of the word *wakf* or *moukoofa* sufficient. And Shâhîd [*viz.*, Sadr-ush Shâhîd] has stated that in accordance with universal practice, *we* decide according to it. And it is stated that the jurists of Balkh decide according to the opinion of Abû Yusuf, and hold the *wakf* to be valid when it is merely declared to be *wakf* but no object is mentioned, nor it is said that the *wakf* is in perpetuity."

"In a *wakf* on the affluent there is *kurbat* [approval of the Almighty]."

"Among the conditions of *wakf* are that the *wâkif* should not be under the inhibition of the Kâzi for want of intellect or insolvency, as Khassâf and Kamâl have stated. And Kamâl has said that if an imbecile makes a *wakf* on himself and after that on an object which is not liable to failure, such a *wakf* according to Abû Yusuf is valid. and the learned *Mohakkakîn hold this to be correct.* And according to all, when the Hâkim [Judge] has made an order [in respect thereof it will be valid.] The *Bahr-ur-Râik*, however,

[1] A work of great authority, see Morley's Dig., Introd p. cclxxxviii.

has combated this view and has said that *wakf* is a *tabarru*, and a person of weak intellect is not capable of making any disposition. This objection may be answered thus: a person of weak intellect cannot do an act of generosity in favour of another, but there is no prohibition to his making a *tabarru* in his own favour; and [when he makes a *wakf* on himself], it is an act of benevolence for himself, but when after his death others are to get the benefit of the *wakf* in that case sanction [of the Kâzi] must be obtained."

"And the jurists have held that when a person who is indebted to such an extent that his debts surround his property, whilst labouring under a death-illness makes a *wakf*, his dedication would be set aside, and the property would be sold for [the liquidation] of his debts. But when the *wakf* is made in health, it will be *binding* even though the debts should surround his assets, if the *wakf* was made before the inhibiton [of the Kâzi.] Such a *wakf* by *consensus* cannot be cancelled. So also it is stated in the *Fath-ul-Kadîr*."

"According to the Imâm (Abû Hanîfa) and Mohammed, it is one of the conditions of *wakf* that it should be ultimately destined for an object which will not fail in perpetuity, and if he [the *wâkif*] does not mention such a purpose, according to the Imâm and Mohammed, it will not be valid. And Abû Yusuf (may God's blessings, &c.) says that the mention of such a purpose is *not* necessary, but the *wakf* will be valid even if he has mentioned only an object likely to fail, and after that [*viz.*, its extinction] the *wakf* will be for the poor, though he may not have mentioned them, for the intention of the *wâkif* is [from the *wakf*] that it should be for the poor, though not named. Thus, this condition will be imported by necessary presumption of law. So also it is in the *Hindieh* [*Fatâwa Alamgiri*]."

"Another condition is that the subject is suitable for dedication. According to the correct doctrine both immovable and movable property may be made *wakf*. [With respect to the latter] anything which by usage and practice it is customary [to dedicate] like Koran, &c., may lawfully be made *wakf*. From this it follows that though in the neighbourhood of Egypt, it not being customary a *wakf* of current coins may not be valid, in the countries of

Rûm [the Turkish Empire] the *wakf* of *dirhems* and *dinars*, being customary, is lawful. When such a *wakf* [*viz.*, the *wakf* of *dinars* and *dirhems*] is made, it will be invested in *Muzâribat*, and the income will be devoted [to the purposes of the *wakf*]."

"And the *Fatwa* is on this rule that without the land, houses and trees may lawfully be made *wakf*. So it is stated by the Kari-ul-Hedâya."

"The *wakf* must be immediately operative and not hanging in suspense, [*i.e.*, dependant for its operation upon the happening of some contingent event which may or may not happen]."

"The *wakf* of an apostate from Islâm will be invalidated whether he suffers the extreme punishment of the law or does not..... But if he returns to Islâm and confirms it, it will take effect. So Khassâf has explained it at the end of his book."

"Abû Yusuf used to agree with the Imâm [*viz.*, Abû Hanîfa] in the opinion, that a *wakf* did not become binding until after the decree of the Kâzi or unless made by way of a testamentary disposition. But when he went to Medîna on a *hajj* with [the Caliph] Harûn-ar-Rashid and saw there and in its neighbourhood all the numerous *wakfs* created by the Companions of the Prophet, he abandoned Abû Hanîfa's opinion, and made decrees declaring the obligatoriness of a *wakf*. In fact all the jurists have followed the rule of the two Disciples; and have held that the *Fatwa* is thereon.....So it is stated in the *Bahr-ur-Râik*."

"The ultimate destination of a *wakf* should be for an object of piety not likely to fail, but existing in perpetuity. Some say that perpetuity is a condition by *consensus*, but according to Abû Yusuf the mention of perpetuity or of an unfailing object is not necessary, for the words *sadakah* and *wakf*.....distinctly imply that. I have already stated that *wakf* like emancipation is the extinguishment of the right of property without its transfer to anybody else, and therefore it is stated in the Book [*Mukhtasar-ul-Kudûri*] that after the failure of the objects mentioned it will be for the poor, and *this is correct*."

"In the *Sharh-ul-Multeka* it is stated that when a *wakf* is *mussajjil* [*i.e.*, when the document creating it has been sealed or endorsed by the Kâzi], though all [other] evidence regarding it is lost, and the descendants of the *wâkif* want to set it aside, Mufti Abû Saood in his *Maarûzât* has laid down that the Kâzis should be prohibited from listening to such claims. So this should be borne in mind."

" In the *Hindièh* it is laid down that when a man erects a mosque his right to the property does not become extinguished until he has separated it [from his other property], and given permission [to people] to pray therein"....." And if he constituted one person as *muezzin* and *imâm* and he gave the *azân*, called out the *takbîr* and offered the prayers, though by himself, it will become a *masjid* by *consensus*. And if he consigns the building to the *mutwalli* appointed for the purpose, it will be obligatory and lawful, though no prayer has been offered therein, *and this is correct*. So also if he consigned it to the Kâzi or his deputy." [This is in the absence of a formal dedication.]

" In the *Multeka* and its commentary, it is stated that it is laid down by Abû Yusuf that by the mere declaration [of the *wâkif* that he has constituted a property *wakf*], his right therein becomes extinguished absolutely. And the *Tanwîr* [*ul-Absar*], the *Durrar* [*-ul-Ahkâm*], and the *Vikâyah*, &c., have peferred the rule of Abû Yusuf, and you know that it is preferred in *wakf* and in judicial decisions." P. 536.

" And according to Abû Yusuf it is lawful for the *wâkif* to reserve the usufruct of the *wakf* or its governance for himself, and on this is the *Fatwa*." P. 544.

" The conditions as to alteration or exchange [*i.e.*, alteration of investment] is lawful by *ijmaa* though some have ascribed this rule to Abû Yusuf. The *Fatwa* is thereon. And in the *Bahr* [*-ur-Râik*] it is stated that it is universally agreed that when the *wâkif* has made a condition for himself of altering the *corpus* of the *wakf* [in others words, of altering the investment], both the *wakf* as well as the condition will be valid, and he will have the power to do so."

" In the *Bahr-ur-Râik* it is laid down that if he has conditioned that he may alter it into land, then it will not be lawful to turn it into a house, for he has no power to alter the condition."

" In the *Sharh-ul-Multeka* it is stated from the *Ashbâh* [*-un-Nazâir*] and other [authorities] that the *Fatwa* is on the *kowl* [rules] of Abû Yusuf in all that pertains to *wakf* and judicial decisions." P. 545.

" The opinion of Mohammed is adopted for *Futwa* in holding that the reading of the Koran near a grave is not abominable."

" Trees planted in a mosque became the property of the mosque, as they are on the same footing as a building erected within the

mosque [premises]. But trees planted by the side of a public road, a public canal or a village reservoir, remain the property of the owner, and he can transplant them [when he likes]."

"When the dedicated property is mortgaged to another, and the mortgagor dies before redeeming it, but leaves property along with the debt, it will be satisfied out of such property, and the *wakf* will take effect. But if he leaves no [other] property, the matter will be taken before the Kâzi, and the *wakf* will be cancelled, and the property will be sold to satisfy the debt."

"So long as any one of the kindred of the *wâkif* is fit for the *towliat* a stranger should not be appointed.....when a stranger has been appointed and a person qualified among the kindred is forthcoming, the *towliat* should be given to him."

"It is not lawful to burden a *wakf* with any debt. It is stated by Ualw'alji that if revenue or arrears thereof is demanded from the *mutwalli* of a *wakf*, when he has nothing in his hands from the property of the *wakf*, if the *wâkif* has authorised him to raise money by loan to pay the revenue, it will be lawful for him to do so; in such a case what Abû Lais has said is to be adopted. If without borrowing there is no help, the matter should be taken before the Kâzi who will authorise the *mutwalli* to raise the loan to be paid afterwards from the produce. This is because the Kâzi has this power. But if he is at a great distance from the Kâzí and to appear before him is impossible, in that case the *mutwalli* may borrow himself, and this is when there is no income that year. But when there has been produce and he has distributed it among the beneficiaries without reserving anything for the *Khirâj*, he will be responsible to the amount of the *Khirâj*. This is the abstract of what Hamâwi says, and so it is in the *Anfaa-ul-Wasâil*."

"If a man makes a *wakf* of his land on his children and children's children for ever so long as his posterity lasts, the produce will be divided equally among his descendants, and no preference will be given to males over females, *for the wâkif* established an equal right for all of them; in the *Zâhir-ur-Rawâyèt* it is stated that in such a *wakf* the descendants through females [*lit.* daughters] will not be included; on this is the *Fatwa*." P. 562.

"In the *Anfaa-ul-Wasâil* it is written from the *Zakhîra* that

the Shaikh-ul-Islâm was questioned regarding a well-known *wakf* as to how it should be applied, and what should be spent on the beneficiaries, it being invested in doubt; he answered regard should be paid to what was customary in former times, and to the practice of former *mutwallis*." P. 564.

"In the *Bahr* [*ur-Râik*] it is stated regarding the allowance of a *mutwalli*, that if he be the *mutwalli* of the *wâkif* [in other words, if he be appointed by the *wâkif*] he will get what is provided [in the *wakf*], though it may be more than the customary salary; but if he be appointed by the Kâzi, he will get what is usual." P. 566.

"The *Fatwa* is on the legality of taking wages for the reading of the Koran on any specified spot, and also on the saying of Mohammed that it is not sinful to have the Koran read near a grave; so in the *Bahr*."

"If the *wâkif* has fixed the *towliat* for the fittest and *then the fittest*, in such case the *mutwallishîp* will be for the fittest of his children, if the fittest happen to be *fâsik* [addicted to vice], then the one nearest to him in fitness will get the *towliat*. If afterwards the former abandons viciousness and becomes just and is superior in fitness to the latter, the *wilâyèt* should be given back to him. If the fittest rejects the *wilâyèt*, then the *towliat* should be given to the one nearest to him in fitness. If they are all equal in fitness, then the one older in age should be appointed but whether that person be a man or a woman. And if there is none among them fit, in that case the Kâzi may appoint a stranger, but when any fit person is forthcoming among them afterwards the *wilâyèt* is to be given back to him." P. 567.

"The Kâzi-ul-Kuzzât [or the Chief Kâzi] alone has the power of appointing *mutwallis* and executors and by Kâzi is not meant every Kâzi. So also it is stated in the 27th section of the *Jâmaa-ul-Fusûlain*." P. 567.

"In the *Hindièh*, it is stated that when a *wakf* is made on one's *nasl* and *zurriat*, in that are included one's descendants through males as well as through females, whether near or remote." P. 568.

"When a person says this land of mine is *wakf* on my *walad* [child in the singular], in that case, the produce will be for the child [or children] of his loins, whether male or females. And if

he said, this is a *wakf* for my male *walad*, then the produce will be only for the male child [or children] of his loins. And when the children of his loins cease to exist, then the produce will be expended on the poor, it will not go to the *walad-ul-walad* [he having used the singular expression (*walad*), the presumption is that he meant to restrict the *wakf* to his own children]. But if at the time of the *wakf* [created with the word *walad*], there was no child of his loins in existence, but a child [or children] of his son whether male or female, then the produce will be spent only on such grandchild [or grandchildren] and none of a lower generation will share in it. And in the *Zâhir-ur-Rawâyèt* it is stated that the child of a daughter will not be included therein, and the *Fatwa* is on the *Zâhir-ur-Rawâyèt*."

"And if the *wâkif* had said that this is a *wakf* for my *walad* and the *walad* of my *walad*, and he did not restrict it for males in such a case the children of his loins and the children of his sons and the children of his daughters will be included, and this is correct. All these will share equally in the produce, and the *wâkif*'s own children will not be preferred to the children of his sons, nor the children of his sons to the children of his daughters, unless he has restricted it to males, then the male children of his sons and daughters will be included. And this is correct."

"And if he added the third generation and said thus, 'on my child and the child of my child, and the child of my child's child,' in this *wakf* his *nasl* [posterity] will be included, and so long as his posterity lasts, the produce will be expended on his descendants; and if there is a single one of his descendants existing, however remote, nothing will be given to the poor. If the *wâkif* [*in such a wakf*] has used any expression which denotes that his descendants will take in such an order, *e.g.* if he has said thus, the nearest will be nearest, or thus, on my child and then on my child's child, or thus *batnan-baad-bâtn*, in all such cases, a commencement will be made [*in the distribution of the produce*] as conditioned by the *wâkif*; [thus it is stated in the] *Durrur* [*-ul-Ahkâm*]."

"If the *wâkif* at the outset used the plural expression, on my *awlâd* [children], in that case the *wakf* will be for his descendants so long as they exist, and the near and the remote will be equal unless the *wâkif* indicated the order in which they should take.'

Khazânat-ul-Muftiîn.[1]

Extracts from the Chapter on Wakf.

"Etymologically the meaning of *wakf* is detention. In ..... law, according to Abû Hanîfa (may the mercy, etc.) the detention of the substance of a thing in the proprietorship of the owner and the consecration of its usufruct on the poor or on any object among objects of benevolence. Thus, this will be in the same way as an *ârîat* and therefore will not be binding, and it will be lawful for the *wâkif* to revoke it and sell the property."

"And according to the Disciples, it is the detention of property in the ownership of Almighty God, and the right of the *wâkif* becoming extinguished in it [*viz.*, the property dedicated], it is transferred to Almighty God for the purpose, that its profits may be expended on His creatures. And therefore it [a *wakf*] is binding and [the subject of] it can never be made a gift of, nor can it be inherited nor sold, and it is on the footing of a mosque."

"According to Mohammed there are four conditions for the validity of a *wakf*, to consign it to a *mutwalli*, to separate it [from the other property of the *wâkif*], not to reserve for one's self any interest in the produce of the *wakf* and to make it perpetual in this way that its ultimate application should be for the poor..... And Abû Yusuf has laid down that no such condition is necessary and the *Mashaikh* of Khorassan have adopted the opinion of Abû Yusuf; the jurists of Bokhara that of Mohammed....."If a man make a *wakf* of his land on a specified body of people attached to a mosque, though he may not have destined its end for the poor, according to the universality of jurists the *wakf* will be valid. And this is recognised as authoritative. If he has constituted his house as a mosque and appointed a person as *muezzin*, and this person gave the *azân* and made the *ikâmat* and offered the prayers [though] by himself, this will amount to consignment and this is recognised....."When a mosque is ruined and people have no need for it, the jurists hold that it is a mosque for ever, and this is most correct."

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[1] "The Treasure-house of the Muftis," frequently quoted by the Law Officers and referred to in the *Alamgiri* and in the cases given in Macnaghten's Principles and Precedents of Mahommedan Law, see p. 332 and p. 342. See also Morley's Dig., Introd., p. cclxxxvii.

"The burying of one corpse in a cemetery, the alighting of one person in a *khân*, the passing of one person along a road, the drinking of one person at a well.....is equivalent to consignment and is sufficient [even without formal dedication], according to the authoritative opinion."

"*Shuyuu* is in truth a bar to complete seisin, but those who do not consider consignment as a condition of *wakf*, also uphold the validity of the *wakf* of *Mushâa*. According to the *Mashaikh* of Khorassan the *wakf* of *Mushâa* is valid; according to Mohammed it is not, and this was adopted by the jurists of Bokhara. [But] all moderns have decreed according to the rule of Abû Yusuf that it [the *wakf* of *Mushâa*] is lawful, and this is authoritative."

"It should be known that when a 'confused' [joint undivided] property is not capable of partition, it can be lawfully dedicated without difference of opinion."

"If a man makes a *wakf* of *dirhems* or food or whatever is weighed or measured according to Imâm Zuffer, it is lawful. When asked how such things can be made *wakf*, he answered the money should be invested in *muzâribat* and whatever profit is derived therefrom will be devoted to the purposes of the *wakf*; and what is weighed or measured will be sold and its price like *dirhems* will be invested in trade or business. And the jurists have held, and analogy is so, that if the *wâkif* provide thus 'this measure of wheat will be loaned to the poor, for purposes of cultivation for themselves: and that after they have reaped the crops, the same measure will be taken back from them and similarly for ever it should be loaned to other poor [people]'; this will be lawful. And like this there are numerous *wakfs* in Damawand and the hilly tracts of Tabristan."

"When a man has made a *wakf* and has [expressly] conditioned the *wilâyèt* [governance] for himself or anybody else, in that case the governance will be for him or that person. And the *wâkif* is superior to any body else. And whoever has constructed a mosque has a superior right to appoint its *muezzin* and to spread its carpets [that is to manage its affairs]."

"If the *wâkif* is not trustworthy, the Kâzi out of regard for the interest of the beneficiaries will take away the *wakf* from his hands and will appoint another *mutwalli* in his place, whether the *wâkif* reserved the *wilâyèt* for himself or not. Even though he

reserved the *wilâyèt* for himself and conditioned that the Kâzi shall not have the power of removing him, that condition being contrary to the *Sharaa* is *batil*. But the Kâzi will have the power to remove him and appoint another when it has been proved that he is not trustworthy. This power is similar to the power of the Kâzi to remove an executor appointed by a deceased for his minor child who proves himself untrustworthy."

"And all that has been stated in relation to the question of the government of a *wakf* is founded on the rules laid down by Abû Yusuf with whom is the *Fatwa*.....In the *wilâyèt* of a *wakf* the *wâkif* is superior, and then his heirs and his kindred, unless they are *fâsik* [addicted to vice] or become *fâsik* in which [latter] case it will be taken away from them and a stranger may be appointed. If they become fit again, it [the office] will be returned to them."

"..... If the *wâkif* appoints a stranger as his *mutwalli*, and then wishes to remove him and take up the *towliat* himself, he will have that power."

"The *mutwalli* may lawfully make a *wasiat* [of the trusteeship] to another for after his death."

"If the *wâkif* has said to another 'you are my *wâsi* in this *wakf*, this is *tawkil* [*i.e.*, the appointment of an agent] and so long as the *wâkif* is alive, the *wilâyèt* will be for him [the person so appointed], and after the *wâkif's* death, the *wilâyèt* will cease unless the *wâkif* had said that the *wilâyèt* will be [also] for that person after his death."

"If there is no *mutwalli* for the *wakf* until death has approached the *wâkif* and then he made a *wasiat* to another in this way that he will be the *wâkif's wâsi* in all his *amwâl* [property] and the *mutwalli* of his *wakf*—it will be so. And if the *wâkif* afterwards appoints another *wâsi*, this latter will not be the *mutwalli*."

"If no *mutwalli* was appointed until the Kâzi appointed one, the *wâkif* will not have the power of removing him in order to have himself the *towliat*."

"If the *wâkif* has appointed two persons as the *mutwallis*, and one of them dies appointing the other as his *wâsi*, the surviving *mutwalli* will have the power over all the affairs of the *wakf*."

"The beneficiaries have no right to partition the *wakf* property among themselves ..... nor can the *mutwalli* hypothecate it for any

debt he may have incurred for the *wakf*, and if he has done so, and the mortgagee has been in possession for any time, he shall be liable for the usual rent (*ajr-ul-misl*)."

"If the *wâkif* has consigned by will the *wakf*, and upon that has made a condition that the executor will not have the power to leave the trust to another, this condition will be lawful."

"..... And if he conditions that the *wilâyèt* will be for so-and-so and after him for so-and-so this will be lawful, for this is like a *wasiat*."

"If he has made a *wasiat* [in respect of the trusteeship of the *wakf*] towards two persons, if one of them should accept and the other decline, the Kâzi in that case should appoint another in the latter's place, so that the intention of the *wâkif* that the affairs of the *wakf* should be conducted by the joint judgment of two persons may be carried into effect." ..... "And the Kâzi may lawfully entrust the entire *wilâyèt* to him who has accepted."

"If the *wâkif* says that the most excellent (*afzal*) of his children will be the *mutwalli*, in that case the *wilâyèt* will be for the *afzal* among them. If he proves to be wicked, then the next to him should be appointed, and if he abandons his wickedness and adopts the ornaments of piety and dignity, and is better qualified than the second, the *wilâyèt* will be restored to him. And when both are equal in honesty, uprightness, judgment, and excellence, then the one best acquainted with the affairs of the *wakf* will have a superior claim, and if one of them is superior in piety and virtue and the other in the knowledge of the affairs of the *wakf* and is not likely to deceive, the latter should be preferred."

"And if he has consigned the trust to Abdullah until Zaid's arrival, it will be done as he said."

"And if the *wâkif* has consigned the trust to another and that person dies during the lifetime of the *wâkif*, the *wâkif* will have the power of appointing another *mutwalli*, though the last one might have been nominated by the Kâzi."

"When the descendants of the *wâkif* and members of his family are in existence, a *mutwalli* should not be appointed from among strangers. But when there is no one fit among them a stranger may be appointed, and if a stranger has been appointed, and then some one fit among the members of ..... his family is forthcoming, the *towliat* should be given to him."

"A *mutwalli* may lawfully consign the trust to another by way of a *wasiat* to take effect upon his death. But if he wish to appoint another for himself during his lifetime and whilst in health, it will not be lawful, unless the trust to him is in a general manner [*alaa sabîl-uttaamîm.*]"

"According to Abû Yusuf, consignment is not necessary for the validity of a *wakf*, and therefore in cases of a khân, cemetery, reservoir, etc.), neither the delivery of seisin nor the alighting of one traveller, nor the burial of one corpse, nor the drinking of one individual which [according to Mohammed] amount to delivery of seisin—is necessary. Simple testimony [as to the formal declaration of the *wakf*] is sufficient."

"If a man say 'this land is a *moukoofa* or *sadakah-moukoofa* on myself,' this is as lawful as if he had made a condition that during his lifetime he should himself eat out of it and feed others therewith. Therefore it is approved as authority that this *wakf* is valid."

"A man makes a *wakf* on the poor and makes a condition that he should eat out of it, saying that it will be lawful for me to eat of it; this is lawful."

"And if he says 'this land of mine is a *sadakah-moukoofa* or *moukoofa* in perpetuity for Almighty God that so long as I am alive its produce should be [*lit*, remain current] for me,' and adds no more, it will be lawful. And when he dies, the *wakf* will be for the poor."

"And if he says, 'whilst I am alive its produce will be for me, and after me for my child and childs' child and their *nasl* so long as their *nasl* exists, it will be for them, and when they cease to exist it will be for the poor'; this will be lawful."

"And when the *wâkif* besides his maintenance has made this condition, that his debts should be paid out [of the produce], this condition will be lawful."

The Ashbâh-wan-Nâzir[1] *with Hamâwi's Commentary.*

"To decide contrary to the conditions of the *wâkif* is tantamount to deciding contrary to the prescriptions of the Lawgiver, and there-

[1] Calcutta Edition, 1260, A. H The *Ashbah-wan-Nâzir* is a celebrated work [see Morley's Dig. Introd. p. cclxxi] by Moulana Zain-ul-aabidin Ibrahim (commonly known as Ibn-Nujaim) al-Misrial-Hanafi [*i.e.*, of Egypt, belonging to the Hanafi sect]. The commentary is by Moulana Syed Ahmedbin Mohammed al-Hanafi-al-Hamâwi [of Hamavah] who died in Cairo on the 8th of Rajjab 970.

fore such decision will not take effect, for the jurists have held unanimously that the conditions laid down by the *wâkif* are like the prescriptions imposed by the Lawgiver [*viz.*, the Prophet]." P. 146. [This is well worthy the consideration of our Indian Law Courts so apt to run away with their own conceptions of law and equity.]

"In the *Zakhîra* and the work of Ulalw'alji, &c. it is stated thus that unless the *wâkif* has so provided, the Kâzi cannot lawfully appoint a *farâsh* for a mosque."

"From this it is clear that it is not lawful to introduce in *wakf's* new allowances [not provided for by the *wâkif*."].....

"If the *wâkif* has authorised the *mutwalli* to appoint servitors in a mosque [or any such institution], he may lawfully appoint new servants, not otherwise; nor can the Kâzi authorise him to do so;" *Hamâwi*, p. 162.

"If a man make a *wakf* on his *zurriat* [posterity] without giving the order of the generations, then all high and low will take equally;" *Ashbâh*, p. 179.

"But if he has made *wakf* on generations with this condition that the prior will take first and thereafter and thereafter, [that is in succession to each other] and does not say anything more, in that case so long as there is any one of the first generation, no one of the second will take anything. When a man has made a *wakf* in favour of his children and *their* children and *their nasl*, in such a case the child, whose father has died before the *wakf*, will not be included in it, for the *wâkif* has restricted [the *wakf*] to the children of the beneficiaries, so his child who has died before could not come under the *wakf*." [This is only a question of construction and depends on the language used to indicate the intention of the *wâkif*. If the *wâkif* had said my children and children's children and children's children's children there could be no question as the inclusion of the child of a predeceased child.]

"If a person make a *wakf* upon his *awlâd* and the *awlâd* of his *awlâd* and his *zurriat* [posterity] on this condition, that it should commence with the first *bâtn* [generation] and *thereafter* and *thereafter*, in such a case, I say there is nothing for the second generation whilst there is one of the first. If one of the second generation dies, whilst the first generation are in existence, leaving a child, that child will not participate with the second generation,

when they get the benefit, as he belongs to the third generation, but he will get his share when the third generation get the benefit."

"If a person make a *wakf* on his *awlâd* and the *awlad* of his *awlâd* and his *zurriat* and *nasl*, and give no order [in which they should take], but condition that whenever one of them dies leaving a child, the share of the deceased will go to such child,—in such a case, the distribution between a child and child's child will be equal, and accordingly what the deceased was to get will be for his child, and such child will [then] get two shares, one in his own right as participating in the *wakf* and the other the share of his parent which devolves on him."

"If a person make a *wakf* on the children of his loins, male and female, and on the male children of his children, and on their *awlâd's awlâd* and *nasl*—in such a case his male and female children and the male children of his sons and daughters will share equally and in it will be included the children of the daughter of the sons. If he said that the first *nasl* will be first and *thereafter* and *thereafter*, in such a case the children of his loins, male and female, will take first; after them it will be for the children of his sons and not for the children of his daughters; and then for the children of his son's children in perpetuity." P. 180.

"If he were to make a *wakf* on his daughters and on their *awlâd* and on their *awlâd's awlâd* in such a case, the rule is that the produce will be for his daughters and for their *nasl*."

"It is not lawful to create a debt over a *wakf*, but if there arises a necessity for borrowing for the benefit of the *wakf*, such as for its repairs or for buying seed, in that case borrowing is lawful under two conditions; *first*, that it must be with the sanction of the Kâzi, and *secondly*, that it is not possible to meet the necessity by its rent, if let for a limited period. So has Ibn-Wahbân written. To have to spend on the beneficiaries is not such a necessity [as would justify borrowing], so it is stated in the *Kinia*."

"It is not necessary for the validity of a *wakf*, that the object for which the *wakf* is being created should be in existence at the time of *wakf*, therefore if a *wakf* be made on the children of Zaid, though Zaid has no children [then], the *wakf* will [nevertheless] be valid; and until Zaid has children, such *wakf* will be expended on the poor."

"It is incumbent to observe the conditions imposed by the *wâkif*, for the jurists have declared that are like the *Nass* [prescriptions] of the Lawgiver.....But [they may be departed from] in the following particulars :

"(1) If he has conditioned that the *Nâzir* shall never be removed, the Kâzi has still the power of removing a *Nâzir* who is unfit.

"(2) If he has conditioned that the *wakf* property should not be leased beyond a year, but there is nobody willing to take a lease for a year, or that there is greater benefit to the beneficiaries from a longer lease, the Kâzi has the power of contravening the condition laid down by the *wâkif* but not the *Nâzir*.

"(3) If the *wâkif* has conditioned that the Koran should be read over his grave, such fixing should be excluded."

According to Hamâwi, however, "most of the learned have held it to be clear that the view [expressed in the third head] is founded on the opinion of Imâm Abû Hanîfa who considered the reading of the Koran near a grave to be abominable ; so according to him the *wâkif* saying that it should be read over his grave would be void. But [on this point, *viz.*, on the lawfulness or otherwise of having the Koran read over the grave], the *Fatwa* is on the opinion of Imâm Mohammed according to whom the reading of the Koran near the grave is not abominable. So it is in the *Khulâsa*. Therefore the *wâkif's* condition is binding. The author's statement that it is void is weak."

"(4) If the *wâkif* has conditioned that the balance of the *wakf* income should be given to whoever begs at a particular *masjid* every day, no regard should be paid to this condition." Hamâwi says, "this is according to *Kinia*, but he [the author] has said afterwards that it is preferable to pay a regard to this condition."

"(5) If the *wâkif* has conditioned that the beneficiaries should get fixed rations of bread and meat every day, the *kyyim* [*mutwalli*] may make them cash payments, and in another place it is stated that the beneficiaries may demand and take payments in cash."

"(6) If the allowance fixed for the imâm is not sufficient, *and he is learned and pious*, in that case it is lawful for the Kâzi to increase his allowances." (Hâmawi says, "he has no such

power unless the imâm is learned and pious and the pay fixed by the *wâkif* is insufficient. ")

"(7) If the *wâkif* has conditioned that the investment shall never be altered, if the alteration is beneficial to the *wakf*, the Kâzi may authorise its being changed. And he, (the Kâzi,) cannot dismiss a *mutwalli* if appointed by the *wâkif* without misfeasance. Nor can he remove a *mutwalli* upon the mere complaint of the beneficiaries (*mustahakin*) unless they establish misfeasance against him. And so in the case of an executor."

"If the *wâkif* dismisses a *mutwalli* if he made a condition [reserving the power of discharging and nominating], such dismissal will be valid by *consensus*. But if [he did] not [so reserve this power], it will not be valid according to Abû Yusuf. And the jurists of Balkh have adopted Abû Yusuf's rule." P. 309.

Hamâwi says that the rule of Abû Yusuf has been held to be valid by a large body of people; and in the *Fath-ul-Kadîr* it is stated that it is most *approved* among the learned.

"The founder [of a mosque] is primarily entitled to appoint the *imâm* and *muezzin*; and his child and his people [*ashirat*, tribe, class] are better entitled than strangers."

"When two persons are appointed by the *wâkif* to do a work, they cannot act singly; but when the *wâkif* has conditioned that he and another shall have the power of altering the investment, he will have the power of doing so himself, so it is [stated] in *Fatâwa Kâzi Khân*."

"Hisâmi has stated in his *Wâkiat* that the Kâzi has the power of appointing a *mutwalli* without any provision [to that effect in the *wakf*], but he cannot appoint [new] servants in a mosque without such a condition."

"It is abominable to give to the *fakîr* of a *wakf* two hundred *dirhems* ..... but when the *wakf* is in favour of [the *wâkif*'s] indigent kindred so much may be given; so it is stated in the *Ikhtiâr*."

"When a man makes a *wakf* of a house on his two sons and on their children for ever so long as their posterity exists, and they intend residing in it, none of them has a right to do so ..... for it is evident that when the *wâkif* applied the term *wakf* to the house, he devoted the rent of the house to the beneficiaries; therefore it will not be used for their residence."

Sharh-ul-Wikâya.[1]

Text [of the *Wikâya.*]—"The meaning of *wakf* [according to Abû Hanîfa] is to tie up a property like an *adriat* in the proprietorship of the *wâkif* and to devote its usufruct [upon mankind], and according to the Disciples [the meaning of *wakf* is] the tying up of the substance of a thing in the ownership of the Almighty. And according to the Disciples a *wakf* [once made] is obligatory and on this is the *Fatwa.*" P. 223.

Comment.—"There is difference of opinion with regard to the condition relating to the constitution of a house into a mosque. According to Abû Yusuf (may God's mercy &c.), the mere declaration [of the *wâkif*] that 'I constitute this into a mosque,' is sufficient, for according to Abû Yusuf consignment is not necessary for the validity of a *wakf.* According to Mohammed, it is necessary prayers should be offered in *Jâmaat* [assembly]. According to Abû Hanîfa the prayers of one man would be sufficient."

Text.—"And according to Abû Yusuf mere saying 'I have made this *wakf*' will extinguish the right of property."

Comment.—"In other words, the mere declaration of the *wâkif* extinguishes the right of property in him and transfers it to the Almighty. Accordingly consignment to a *mutwalli* is not necessary."

Text.—"To fix the produce of the *wakf* for one's self, and to make a condition that he may change the land of the *wakf* for another land when he likes, are valid according to Abu Yusuf".....

"According to Abû Yusuf a *wakf* is valid even though it is not expressly destined to an unfailing purpose, and when the purpose [named] has become extinct, then it will be spent on the poor."

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[1] Frequently quoted by the Law Officers of the Sudder Court

Tahtâwi Vol. II.

Page 569—70 (TEXT.)

Chapter on matters connected with a wakf in favour of children.

From the *Durrar*, etc., and from the *Mawâhib*[1] on *wakf* in favour of one's self, his child, his generation, and his descendants:—If a person fixes the usufruct for himself during his lifetime and thereafter, and thereafter, it will be lawful according to the second (Imâm Abû Yusuf): and on this is the *Fatwa*, &c.

COMMENTARY.

Page 570.

Chapter on matters connected with a wakf in favour of children.

And females are included, because the word *walad* (one born) is derived from *wilâdat* (birth) which is found in them.—Halabi from the *Durrar*, "If there be no child born of his loins," means when the child born of his loins in whose favour the *wakf* was made dies leaving a child, the latter shall not be entitled to anything of the *wakf* property. In like manner, if, at the time of his making the *wakf*, there be a child born of his loins, as well as the child of his child, and the child born of his loins dies, the *wakf* will go to the poor and not to the child of his child. "To the poor," because the person in whose favour the *wakf* was made was no more.—*Durrar*. "It will go exclusively to the child of his son," because the child of his son shall, in the absence of the child born of his loins, be considered as the child born of his loins.—*Durrar*. "It is correct." This is the *Zâhir Rawâyèt*, and it has been adopted by Hillâl, because the children of daughters belong to the same lines as their fathers, and not to those of their mothers; the case with a

[1] By Moulâna Burhân-ud-dîn Trabulasi (of Tripoli), Sâhib-i-Asnâf (author of the *Asnâf*), placed on the same footing with the author of the *Hidâya* by D'Ohsson.

son's child being just the opposite.—Halabi from the *Durrar*—"And if the words 'and the child of my child' be added ....." According to Allâmah Nûh (may he be immersed in the mercy of God) it purports that if the word *walad* (child), which is related to, or possessed by, *ya* (ي my), the possessive pronoun of the first person, be not qualified by the word male, it would mean child born of his loins, the male and the female equally; and if it be so qualified it would mean exclusively the male child born of his loins. If a man says, 'I have made a *wakf* of this land of mine in favour of my child,' the produce would go to the child, male or female, born of his loins; and if he says, 'I have made the *wakf* in favour of my male child,' the produce would go exclusively to the male child born of his loins; and in the absence of the child born of his loins, the produce would go to the poor, and not to the child's child. This would be the case, if there be child born of his loins at the time of his making the *wakf*, and if, at the time of his making the *wakf*, there be no child born of his loins, but male or female child of his son, the produce would go to him exclusively; and no one of his posterity, save and except him, shall partake of the produce with him; and a daughter's child is not included therein; this is the *Zâhir Rawâyèt;* and according to this *Fatwa* is given. If he says 'in favour of my child, and the child of my child,' and does not qualify it by the word male, it would include the child born of his loins, and the children of his sons and daughters.—According to the correct *Rawâyèt.* They would partake of the produce, neither the child born of his loins having preference to the son's children, nor the children of the son, to those of the daughter; and if he so qualifies it, it would include the male children of sons and daughters. According to the correct *Rawâyèt.*—Finis. "It is restricted to the said two," that is to say, to the child and the child's child. [But] "if he adds the third generation (and says 'in favour of my child, the child of my child, and the child of the child of my child,' it would include all his descendants"—(*Durrar*). The produce would then go to his children (descendants) so long as his posterity continues, and not to the poor, till any of his children (descendants) be alive, be he of a degree howsoever low. Because when he made mention of three generations it indicated distance, that is to say, numerousness of degrees. Hence the restriction is removed, and what remains to be taken into consider-

ation is lineage, in the sense of the word, which includes all ; because it is found in one who is the next as well as in one who is the remotest in descent. The case with the second generation is otherwise, because it is removed by one degree only. " But in the event of his using terms denoting order ——. " If he says in this way " nearest, then nearest," or says " in favour of my child, and then in favour of the child of my child, " or says, " generation after generation, " it would begin from one mentioned first by the person making the *wakf.*—*Durrar.* " As, for instance, he says first of all, ' in favour of my children, using the plural form ————.' " It would make the next in descent as well as the one far removed equal, but not in case of his using terms denoting order ; and this will apply to what follows.

ZAILYE.

Takhrij-ul-Hedâya.

Book on Wakf.

The first tradition.—Said the Prophet, peace be on him, to Omar when he (Omar) wanted to give in charity his land, called Samagh, "consecrate just as it is, so that it may neither be sold, nor conveyed by gift, nor inherited." I say this tradition has been cited by six Imâms. Bokhârî has cited it at the end of the *Chapter on Evidence*, Muslim and Abû Dâûd in the Book on *Wills*, Tirmizî and Ibn-i-Maja in the Book of *Ahkâm* and Nisâî in the Book on *Wakf;* and all of them have taken it from Nâfi, who got it from the son of Omar, who said "Omar got a piece of land in Khaibar, whereupon he came to the Prophet, may peace and safety be unto him, and said, 'I have got a piece of land, a better thing than which I never got, what is your order to me about it.' The Prophet said, 'If you like you may make a *wakf* of it, as it is, and bestow it in benefaction.'" Omar thereupon bestowed it in charity on his relatives, and the poor, and slaves, and in the path of God, and travellers, in a way that the land itself might not be sold, nor conveyed by gift, nor inherited, and that there would be no harm if the *mutwalli* applied the produce of the land to meritorious purposes, and fed with it his friends who were not well-to-do.—*Finis.* In a place in Bokhârî it is stated that the Prophet, peace and safety be unto him, said in this way, "consecrate it as it is, so that it may neither be sold nor conveyed by gift, but (people) may be fed with it," and that Omar Ibn-ul-Khattâb thereupon dedicated it as directed. He (Bokhârî) has also stated that it was a date-orchard. Abû Dâûd has added that Yahya, son of Saîd, said "Abdul Hamid, son of Abdullah, son of Omar Ibn-ul-Khattâb sent to him a copy of the deed of *wakf* executed [by Omar]. "In the name of God, the most merciful. This is what is written by the slave of God, Omar, in respect of Samagh."

He then stated (therein) what had passed between him (and the Prophet) in the way it has been recited by Nâfi, and said:—

"If the *mutwalli* like, he may purchase a slave with the price of (its produce), to look after it."

It was in the hand-writing of Muataqab, and was witnessed by Abdullah, son of Arkam.

"In the name of God the most merciful, this is what has been willed by the slave of God, Omar, the Commander of the Faithful. If anything happen to me, the *mutwalli* of Samagh and of that which surrounds it, *viz.*, the mounds, and of the slaves in it, and of the one hundred parts in Khaibar, the slaves there, and of the one hundred parts in Wadi made *wakf* by Mohammed, peace and safety be on him, shall be Hafsa, during her lifetime, and after her such member of her family as may be intelligent. They shall neither be sold nor purchased. The *mutwalli* shall feed therewith his relatives, and beggârs, and those who have received no inheritance, whomsoever he may choose; and there will be no harm if the *mutwalli* should eat out of their produce, or feed others with it, or redeem with it slaves."—*Finis.*

The word *Akala* with the long sound of the letter *a* means *fed.*

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Hâkim recites in his book called *Mustadrak* in the Chapter on *Fazâil* from Wâkidi, who said:—

"Omar, son of Hind, recited to me this tradition from Abdullah, son of Osmân, and he from Arkam, son of Abi'l Arkam Makhzûmî, who said his father recited it to him from Yahya, son of Osman, and he from Arkam,[1] and he says it was handed down to him by Osman, son of Abi'l Arkam, who said, 'I am the son of a *Sabaa-us-salâm*, (*viz*, of a man who embraced Islâm in the seventh year from the time Mohammed declared himself a Prophet.) He had a house close to Safa. This was the house dwelt in by the Prophet, peace and safety be unto him, at the time of the promulgation of Islâm, and it was in this house that he asked people to embrace Islâm. A large number of people embraced Islâm in this house, of whom Omar ibn-ul-Khattâb was one, and the house was therefore called 'the house of Islâm.' Arkam dedicated the said house on his child [meaning children], and the deed of *wakf* was read out."

[1] The usual process by which the authentic traditions are traced See Morley's Dig Introd., p. cxxxvii

" 'In the name of God the most merciful. This relates to how Arkam disposed of the usufruct of his property, which lies close to Safa, that is to say, he has bestowed it in charity[1] upon his child [children], together with the place where it lies, *viz.*, its environs, so that it may neither be sold nor inherited.' "

"This was witnessed by Hishâm, son of Aâs, and by the slave of Hishâm, the son of Aâs. This house all along continued to be a permanent *sadakah* [*wakf*], his descendants living in it, letting it out on hire, and they alone appropriating its proceeds. And none raised any question."

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"Ibrahim of Hari says in his book *Gharîb-ul-Hadîs* that he learnt from Abû Bakr, son of Abû Shaibah, he from Hafîs, son of Ghyâs, he from Hishâm, son of Urwa, and he from his father, that Zubair, son of Awwâm, made a *wakf* of his house in favour of one of his daughters who was *marudah*. He says *marudah* means a woman who has been divorced, and *fakid* a woman whose husband is dead."

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" It is stated in the *Khilâfiat* of Baihaki, that Abû Bakr Abdullah, son of Zubair Humaidi, said :—

'Abû Bakr bestowed in charity [meaning *wakf* on his child] [meaning children] his house at Mecca, which (charity) does up to this day continue ; and Omar bestowed in charity on his children the usufruct of his property, which lies close to Marwa and Saniya ; and this (*wakf*) does up to this day continue ; and Ali bestowed in charity on his children, his land in Egypt, and his property in Medîna, which does up to this day continue ; and Saad, son of Abî Wakkâs bestowed in charity on his children ; his houses in Medîna and in Egypt, which does up to this day continue ; and Osman bestowed Rûma in charity, which does up to this day continue ; and Amr, son of Aâs, bestowed on his children in charity *Wahat* in Tâif, as well as his houses in Mecca and Medîna, which does up to this day continue.

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The fourth tradition.—..... The Prophet, peace and safety be unto him, used to appropriate (the proceeds of) the things bestowed by him in charity: Muzayyif says it (*charity*) means

[1] May also be translated "dedicated it."

waḳf..... Ibn Ali Shaiba writes in his book *Musannaf*, in the Chapter in which he has cited the traditions on the strength of which he opposes Abû Hanîfa, that Ibn Utaibah (Atbah) recited to him a tradition from Ibn Taûs, and he, from his father, who said—

"I have been informed by Hajar of Mar [a Companion of the Prophet] with regard to the property bestowed in charity by the Prophet of God, may peace and safety be on him, that his (the Prophet's) family used to appropriate the proceeds thereof lawfully and not unlawfully."—*Finis.*

The fifth tradition.—The Prophet, peace to be him, said—

"The thing with which a man maintains himself is a charity."

The author adds Miqdâm, son of Maadi Karab, and Khudri, and Jâbir, and Abi Imâma have also quoted this tradition. As regards the tradition narrated by Miqdâm, Ibn Mâja has recited it, in the *Chapter on waḳf*, from Ismail, son of Ayâshi, he from Buhair, son of Saad, he from Khâlid, son of Miqdâm, he from Miqdâm, son of Maadi Karab, and he from the Prophet, peace and safety be unto him, who said—

"Of the things earned by a man nothing is better than what he earns by the labour of his hands. What a man spends for himself or for his family, children and servants is charity on his part."—*Finis.*

Nisâi recites this in his book *Ishrat-un-nissa* from Bakia and he from Buhair with these words—

"That with which you feed yourself is a charity on your part, that with which you feed your wife is a charity on your part, that with which you feed your children is a charity on your part, and that with which you feed your servants is a charity on your part."—*Finis.*

As regards the tradition narrated by Khudri, Ibn Habbân has recited it in the first Chapter of the first part of his book "*Sahîh*," from the *Duâj* of Abi Samah, that Abu'l Haisam recited to him the tradition from Abi Said Khudri, and he from the Prophet, may peace and safety be on him, who said :—"If a man earns something lawfully, and therewith feeds and clothes himself, and others than him, of the creatures of God; this is a *zakât* (charity) on his part."—*Finis.* Hâkim has also recited this in his book *Mustadrak* in the Chapter on *Atimah*,

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Muslim recites in his *Sahih* in the Chapter on *Zakât* from Abi Zubair, and he from Jâbir who said that the Prophet said to a man "Begin with yourself. Give charity to yourself, and if there be anything left, give it to your wife, then to your relatives, and then so on and so on."—*Finis.* The *As-hâb Sunan* [the authors of the works on the Prophet's ordinances] recite from Mughiri, and he from Abû Huraira, that the Messenger of God said "Give charity." A man thereupon said, "I have got one Dinâr (a gold coin)." The Prophet said, "Give it in charity (*sadakah*) to yourself." He said, "I have got another Dinâr." The Prophet said, "Give it in charity (*sadakah*) to your wife." He said, "I have got another Dinâr." The Prophet said, "Give it in charity (*sadakah*) to your children." He said, "I have got another Dinâr." The Prophet said, "Give that in charity to your servants." He said, "I have got another Dinâr." The Prophet said, "You know better how to dispose of it."—*Finis.* Ibn Hâbân has recited this in his *Sahîh*, and Hâkim in his *Mustadrak*, and they have declared the authorities on which it is based to be correct.

Zakhirat-ul-Fatâwa.

Page 449.

It is laid down in the *Ajnâs* of Nâtiki that if a man makes a *wakf*, and lays down in it with respect to himself that he would, during his lifetime, eat out of it, and feed those whom he likes, that after him, it would go to his child, his child's child, and to his posterity, for ever, so long as it may continue, and that upon its becoming extinct, it would go to the poor; this is valid according to Abû Yusuf, may the mercy of God be on him, and this is not a *wasiat* (disposition by way of a will) in favour of his child, the child eating out of a property belonging to God, the Most High. Do you not see that when a man makes a *wakf* in favour of his children, and their children so long as their posterity may continue, and gives it afterwards to the poor, it is valid. Now, this case is just like it.

If one says, "I make a *wakf* of this land of mine in favour of my child and afterwards in favour of the poor," the income thereof would go to his child and his child's child till they be dead, and none of them be alive, and even if the third generation be forthcoming, the income would go to the poor, and not to the third generation. If he says, "In favour of my child, my child's child, and the child of my child's child," making mention of three generations, the income would be spent by his descendants for ever, so long as his posterity continues, and not by the poor till any of his descendants be alive, be he of a degree howsoever low. The result of this is, that when the person making the *wakf* makes mention of three generations, the *wakf* will be in their favour, as well as in favour of those lower than them, the next and the remotest being equal, excepting when he, at the time of making the *wakf*, says "the next shall be the next," or says "in favour of my child, and after them in favour of my child's child," or says, "generation after generation," in which case, it shall begin with him with whom the person making the *wakf* has commenced.

SADAKAH OR CHARITY.

Mishkât-ul-Masabih.[1]

"THE Apostle of God said, 'Every good act is charity; and verily it is of the number of good acts, to meet your brother with an open countenance, and to pour water from your own bag into his vessel?'"

From Abû Dhar,—"The Apostle of God said: 'your smiling in your brothers' face is charity, and your exhorting mankind to virtuous deeds is alms; and your prohibiting the forbidden, is alms; and your shewing man the road, in the land in which they lose it, is charity for you; and your assisting the blind, is charity for you; and your removing stones, thorns and bones, which are inconvenient to man, is alms for you.'"

From Abû Huraira and Hâshim-bin-Hizâm—"The Prophet said, 'The best of alms is a thing from which is left sufficient for a man's sustenance and his family; and begin by bestowing on those you have affection for.'"

From Ibn-Masûd—"The Apostle of God said, 'When a Mussalman bestows on his family and kindred, for the intention of rewards, it becomes alms, although he has not given to the poor, but to his family and children.'"

Abû Huraira—"The Apostle of God said, 'There is one Dinâr which you have bestowed in the road of God, and another in freeing a slave, and another in alms to the poor, and another given to your family and children; that is, the greatest Dinâr in point of reward, which you gave to your family.'"

Thawbân, "the Apostle of God said, 'The most excellent Dinâr which a man bestows, is that which he bestows upon his own

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[1] Capt. Mathew's Translation, Vol. I, p. 447 & pp. 453-456

For the authority of the work see Morley's Dig. Introd, p. cclvni, and the Translator's Preface.

family ; and a Dinâr spent upon quadrupeds, in the road of God, which is combating for the faith, and a Dînâr which a man bestows upon his friends, in the road of God.' "

Umm-Salmah—"I said to the Prophet, is there any good tidings for me of rewards, for my bestowing on the sons of Abû-Salmah ? His sons are no otherwise than mine. The Prophet said, 'then give to them ; and for you are the rewards of what you bestow upon them.' "

Zainab, wife of Abdullah-bin-Masûd—"The Apostle of God said, 'Give alms, O assemblage of women ! although it be your ornaments.' " She said, "then I returned from His Highness' presence, when I heard this, towards Abdullah my husband ; and I said, 'verily thou art a poor man ; and verily the Prophet has ordered me to give alms, therefore, go to His Highness and ask him, if it is sufficient for me to give to thee and thy children ; and if it should be so, I will perform it, and lay out upon you ; and if it is not sufficient, I shall expend on others.' " Then Abdullah said, "Do you go and ask ; do not trouble me." "Then I went to the Prophet ; and behold ! I saw a woman of the Assistants,[1] at the Prophet's door, whose necessity was like mine ; that is, that woman had also come to ask about this matter ; and verily there was so much awe and fear in approaching His Highness that no person could go to him without his permission. Then Bilâl came out to us from the Prophet ; and we said to him, 'Go to His Highness and inform him that there are two women at the door, and they ask thee, is it not sufficient for them to bestow on their husbands, and on orphans[2] who are under their protection, but do not inform him who we are ; that is, do not tell him our names.' Then Bilâl, went in to the Prophet, and asked him about this matter. He said, 'who are they ?' Bilâl said, 'one of them is of the Assistants, and the other Zainab.' Then the Prophet said, 'which of the Zainabs is it ?' Billâl said, 'Zainab, wife of Abdullah-bin-Masûd.' Then the Prophet said, 'it is sufficient for them to give to their husbands and the orphans; and for them are two rewards ; one for their kindred, and another for alms.' "

Sulaiman-Bin-Aûmir—"The Apostle of God said, 'Giving alms

[1] *i.e.*, Ansar, the people of Medina who assisted the Prophet.

[2] Meaning the motherless children of their husbands.

to the poor has the reward of one alms; but that given to kindred has two rewards; one, the reward of alms; the other the reward of relationship.'"

Abû Huraira said, "a man came to His Highness, and said, 'I have got one Dinâr.' He said, 'expend it upon yourself.' The man said, 'I have got another Dinâr.' The Prophet said, 'expend that upon your children.' The man said, 'I have got another Dinâr.' He said, 'expend it upon your relations, your woman, father and mother.' He said, 'I have got one other Dinâr.' The Prophet said, 'expend that upon your servants.' The man said, 'I have got another Dinâr.' He said, 'you know best the condition of the person most worthy of it; and whoever you know to be so, give it?'"

WAKF.

Bahr-ur-Râik.[1]

"In law, according to Abû Hanîfa, the meaning of *wakf* is the tying-up of the substance of a thing in the ownership of the *wâkif* and the devotion of its usufruct. According to the Disciples it means the tying-up of property in the ownership of Almighty God and the devotion of its usufruct to purposes of benefit to His creatures. In the *Fath* [*ul-Kadir*] a further explanation is added, *viz.*, that the *wâkif* may give the usufruct to whomsoever he likes."

"And in the *Zakhira* it is laid down that a consecration in favour of the affluent is *kurbat*."

"The motive of *wakf* is to obtain the affection of the living in this world, and to approach the Lord of Lords (may his name be glorified) in the next."

"Its conditions are the same as in acts of mere bounty, *viz.*, that is, the *wâkif* must be sane, must be *bâligh*, it must be operative at once and not suspensive."……

"There are twenty-six express words by which it may be constituted :—

(1) This land is a permanent *sadakah-moukoofa* on the poor or on any body, and on this there is no difference.

(2) This is *sadakah-moukoofa;* Abû Yusuf, Hillâl, and all others are agreed thereon.

(3) This is *habs* and *sadakah.*

(4) This is *sadakah-muharrama.* Both these are like the second.

(5) This is *moukoofa.* According to Abû Hanîfa and Abû Yusuf this word alone constitutes a *wakf* and implies its final destination for the poor. …… And Sadr-ush-Shâhîd has laid down that the *Fatwa* is thereon and the *Mashâikh* of Balkh have

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[1] A work of great authority; see Morley's Dig. Introd., p. cclxx, frequently quoted in the Sudder Dewanny Adawlut cases; see especially 1 Sel. R., p. 17.

given *Fatwas* according to Abû Yusuf's rule, and it is customary with us all to decide according to the rule of Abû Yusuf."

(6) This is *moukoofa* on a *fakir*.

(7) This is *mahboosa*.

(8) This is *habs*.

If both these expressions in the language of the place imply permanent appropriation, then it is obligatory as if he had said *moukoofa* or *wakf*.

(9) If he says 'this is for a *sabîl* (path),' if the customary meaning of the word is permanent dedication, it will be so, otherwise he will be asked as to his meaning. If he says he meant *wakf*, in that case it will be *wakf*. If he says he meant a *sadakah*, then it will be a mere votive offering.

(10) 'I have made this for the indigent.'

If the customary sense of these words is *wakf*, it will be *wakf*. If not, he will be asked as to his intention, if he says he meant *wakf*, it will be *wakf*, if he says he meant a *sadakah*, then it will be a votive offering.

(11) *Muharrama*.

(12) His mere saying *wakf*. And this is correct. And among the people of Hijaz[1] it is universal. It is equivalent to saying *hubsun moukoofun*.

(13) And it is like saying shortly, *moukoofatun*.

(14) His saying 'I have made the fruit of my vine trees *wakf*.' This will be *wakf* [of the trees] whether there are grapes on the trees or not.

(15) His saying 'I have made the usufruct [of this property] in this way.'

(16) His saying 'this is *moukoofa* for Almighty God,' it is equivalent to saying *sadakah-moukoofa*. All this is stated fully in the *Fath-ul-Kadîr*. And in the *Bazâzia*, it is laid down that a *wakf* created by the mere word *wakf* or *moukoofa* is valid.

(17) If he says 'this is *moukoofa* on *Wajjah-ul-Khair*, good purpose, or *Wajjah-ul-Ihsân*, benevolent purpose,' it will be a *wakf* for the poor.

(18) If he says 'this is *sadakah-moukoofa* for my *hajj* or for my *umra*,' it will be a lawful *wakf*.

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[1] The part of Arabia where Mecca and Medina are situated

(19) If he says 'this is *sadakah*, it will not be sold,' it will be a votive offering, but if he add it will not be given in gift, and inheritance will not apply to it; in that case it will be a *wakf* for the poor.

(20) If he says 'you buy out of the produce of this house every month ten *dirhems* worth of bread and give it to the needy,' the house will be *wakf*."

The rest are unimportant.

"There is no difference as to the validity of a *wakf*. The only difference is as to when it becomes obligatory and binding. Abû Hanîfa says it becomes binding on the decree of the Judge, [and that] until then it is revocable. The Disciples hold it becomes binding at once, and cannot be sold or given or inherited..... All the jurists have adopted the rule of the Disciples and the *Fatwa* is thereon. And in the *Fath*-[*ul-Kadîr*] it is laid down that it is correct, and on that is the *consensus* of the universality of the Companions of the Prophet. ..... According to Abû Yusuf, a *wakf* is like the emancipation [of a slave] and becomes operative and binding by the mere declaration of the *wâkif*. Mohammed says it becomes binding after delivery of *seisin* to the *mutwalli* and separation and mention of perpetuity."

"If the person making a *wakf* reserves the income thereof for himself, or appoints himself the *mutwalli*, it will be valid, that is to say, if he lays down this condition at the time of making the *wakf*, the condition will be good. The first, however, is valid according to Abû Yusuf, and invalid according to the analogy of what Mohammed says, because he [Mohammed] makes the delivery [of the *wakf* property] to the *mutwalli*, a condition. It is also said that they differ as to the delivery of possession and division being necessary conditions for *wakf*. It is also said that this difference is a new point altogether. The difference being in the case where the persons making a *wakf* makes the condition that a portion shall be enjoyed by himself during his lifetime, and after him, by the poor; and in the case where he makes the condition that the whole shall be enjoyed by himself during his lifetime, and after him, by the poor."[1]

"The reason for what Mohammed says is, that a *wakf* is valid when any one is made owner of a property in the manner here-

[1] That is, there is a difference in both cases.

inbefore described by me. Hence the condition under which the whole or a part is enjoyed by one [making the *wakf*] makes it [the *wakf*] invalid; for it cannot be realised how one can make himself the owner. It would be just like a conditional charity, and the reservation of a portion of the site of a mosque for one's self."

"Abû Yûsuf relies on what has been related regarding the Prophet, peace and safety be on him, *viz.*, that he used to eat out of his *sadakah*, which is understood as *sadakah-moukoofa*, but it is not lawful to eat out of it, unless there be a condition to that effect; hence the above shows the validity of the condition. Besides, *wakf* is the depriving of one's self of the ownership (of a property), and dedicating it to God, the Most High, in the manner stated above, with the object of (*kurbat*) drawing near to God. Hence, if a man reserves a part or the whole for himself, he takes for himself a thing belonging to God, and not a thing belonging to himself; and this is lawful. It is just as a man builds a house for the reception of travellers and strangers, or constructs reservoirs to keep therein water for the use of the travellers, or converts a piece of land into a burial-ground, and makes the condition that he also should put up, or drink, or be interred there. Besides, the object of [the person making a *wakf*] is to do a pious act, and making provision for himself is such. Said the Prophet, peace be on him, 'Provision made by a man for himself is a charity.' It is stated in the *Fath-ul-Kadîr*, 'Preference is given to what Abû Yusuf says.' Sadr-us-Shâhîd says, *Fatwa* is given according to what Abû Yusuf says. We also give *Fatwa* in accordance with what Abû Yusuf says, in order to encourage people to make *wakf*. The *Mashâikh* (jurists) of Balkh have also adopted the same view; and this is what appears from the *Hedâya*, because it gives the arguments in its support and does not refute them. In a case of reservation for one's self, if a man says that the debts due by him should be paid from the income of it [the *wakf* property]; and in like manner, if he says that in the event of his dying in debt, his obligation should be paid off first with the income of this *wakf* property, and that the remainder should be spent in the way of God; in each of these cases the *wakf* shall be valid. In the Book of *Wakf* by Khassâf, it is stated, 'if one makes this condition that he would apply the usufruct of the said *wakf*

property for the maintenance of himself and his children, servants, and family, and if the produce thereof comes [into his hands] and he sells it, and takes into his custody the price of the same, and then dies before spending it; to whom shall it go, whether to his heirs, or to those in whose favour the *wakf* was made? It is said, 'It shall go to his heirs, because the usufruct (as conditioned by him) belonged to him, and he had obtained it. But this does not specify the part they each would get, whether one half, or a fourth, [*viz.*, the whole of the usufruct which came into his hands would be for them jointly].' And such also shall be the case, if any one says, 'If so-and-so, meaning the person making the *wakf*, dies, one part say out of ten parts shall every year be taken out of the usufruct of this *wakf*'s property, and be spent in the performance of the *hajj* for his benefit, in doing penance for the oaths broken by him, and in such and such acts, naming several things,' or if he says, 'So many *dirhems* shall every year be taken out of this property given in charity, for being spent for such and such purposes, and the remainder in such and such acts as he [the *mutwalli*] considers proper.'—*Finis.* It is stated in the *Iláwi*, 'This rule of Abú Yusuf has been adopted for the *Fatwa*, in order to encourage people to make *wakf* and increase benefaction.' From this difference of opinion it may also be inferred that if any one were to make a *wakf* in favour of his male and female slaves, it would be invalid according to Mohammed and valid according to Abú Yusuf, in the same way as the condition for one's own benefit. Some have drawn the same inference also from the above as to the enjoyment of the usufruct by *Mudabbars* and *Umm-ul-Walads*. This, however, is weak; *and what is correct is this, that it* (the enjoyment of usufruct by *Mudabbars*, etc.,) is lawful, both the authorities agreeing in it. Mohammed argues that inasmuch as they (the *Mudabbars* and *Umm-ul-Walads*) shall become free upon the death of the man, a *wakf* in their favour shall be just like a *wakf* in favour of strangers; and it (freedom) is found in them during his lifetime in anticipation of what would be the case after his death. What is said in the *Hedáya* and *Mujtaba* as to their really differing on the said point, is weak.

* * * * * * * * * *

"All our *Mashâikh* have adopted the rule of Abú Yusuf. ..... So that what is written in the *Khânièh* that 'if a person make

a *wakf* on himself, and on so-and-so, half of it will be valid, *viz.*, the share of the other, and the share of himself will be void, or if he says that it is a *wakf* for himself and then for so-and-so, or if he says that is a *wakf* for so-and-so, and then on myself, half will be valid, and the other half will be invalid,' is a matter for surprise. How did the author come to say this? It must be an interpolation. You must know that whatever conditions a *wâkif* has laid down must be given effect to." . . . . . .

Wakf on descendants.

"*There is absolutely no difference* [*as to the validity*] *when a man makes the condition that the usufruct shall be for his children, so that when he makes a wakf in favour of his children, it includes both the male and female, but if he restricts to the male, it would exclude the female children.* * * * * *And when he mentions the third generation, nothing of the usufruct will be spent on the poor, so long as any of his descendants, however remote, is in existence.*" .....

"In the *Tâtâr-Khânièh* it is stated that when a *wakf* is in favour of a specified and known class or people whose number is capable of limitation [or ascertainment] if they appoint a *mutwalli* without taking the opinion of the Kâzi it will be valid if they are people of judgment. The ancients say that it is preferable to place the matter before the Kâzi, but all modern jurists say it is preferable not to do so.....our masters and modern *Mashâikhs* are agreed that it is better such people should appoint their own *mutwalli*.

APPENDIX.

Wakfnamah in *Doe dem Jaun Beebee* v. *Abdollah Barber.* (Fulton's Reports, p. 345.)

"Praise unto God, the bestower of grace and support, and blessings on Mohammed, the chief of the prophets, his descendants and companions, who are perfect and united, after which I, the declarant, Masummat Goonda Bibee, wife of the late Sheikh Culloo Khansamah, inhabitant of Mawza Colinga in Dehu Berjee, one of the Mahullas of the town of Calcutta, being sound in body and mind, competent to perform all legal acts, of my own free will, without aversion or compulsion, make the following binding and lawful declaration:—

"Whereas different spots of ryotty land, and land in my own occupation purchased by me without the participation of others, as appears by the vouchers granted by the vendors that sold the same unto me, and property formerly belonging to my husband, received by me as my marriage portion, all which landed property is duly defined by pottahs and bills of sale, and well-known limits, are held by me in my own exclusive possession, under my proprietary right thereto, free from the participation of others, and old rights included therein, or otherwise appertaining thereto, both great and small, I hereby grant and dispose of the same, as a pious donation to please God, who is above all on the following conditions:—

"1st.—Whereas the aforesaid lands, subject to rent, are situated in the town of Calcutta, I will appropriate as much of the produce thereof as is required by my own use unto the said purpose, after defraying the revenue and taxes thereof, and the remainder to hereditable and charitable purpose, and my several relatives, that is, my grandson and grand-daughter and daughter-in-law, and daughter's son and daughter's daughter, who are now receiving maintenance living together, united in meals shall continue to receive the same in like manner, and the power of increasing

or decreasing the number of incumbents according to the increase or decrease in the produce will remain with me, and the repairs of the mosque, and salary of the Mowuzzin, Khattab, and other expenses connected therewith, in the seasons of Ramazaun Mobarek, and the Eed, shall be defrayed from the produce, and the person who is hereafter appointed *mutwalli*, will enjoy the same powers as I myself possess.

"2nd.—I will continue *mutwalli* as long as I live, and on my decease my daughter's son Abdollah, son of Sheikh Joomun, inhabitant of Calcutta, will become *mutwalli*, after the said Abdollah, one from among my relations who is the most fit and possesses integrity, temperance, intelligence, and respectability and appears most deserving.

"3rd.—After my decease, neither my heirs or the *mutwalli* will have the smallest right to sell or give away or transfer the above-mentioned lands in any manner whatsoever. Part thereof is expended in hereditable, charitable, and benevolent purposes, shall be disbursed under my own control and direction.

"These few words are, therefore, written by way of a voucher of a pious donation, to serve as a binding and decisive document when occasion requires. [A specification of the lands comprised in the above pious donation then followed.]

"Written on Thursday, the last of the month of March, of the year 1832 of the Christian era, corresponding with the 19th of the month of Phalgoon, of the year 1283, Bengal style, corresponding with the 27th of the month of Ramzan Mobarek, of the year 1247, of the Hegira."

Fath-ul-Kadîr.

(Printed Ed. p. 858.)

"And when any one of the recipients of the benefaction dies, and the *wâkif* has made no mention what would become of his share upon his decease, in that case the usufruct will be divided among his surviving children every year, and will be given both to the affluent and the indigent of them, unless he [the *wâkif*] has provided that the *wakf* is for the needy [of his children] . . . . . it must be known [lit. know] that when he [the *wâkif*] mentions [in the *wakf*] his children and kindred, [in other words, when the *wakf* is on them,] the *wakf* is valid for the affluent and indigent among them, unless he has specified that it is for the needy [of them alone] as I have already stated. But if it [the *wakf*] is for others than they [*viz.*, if it is for strangers] in such a case the Shams-ul-Aimma [Sarakhsi] has stated that if he [the *wâkif*] has specified its application for purposes of necessity, it is valid whether the persons in whose favour it is made are limited or unlimited in number, for the object of a *wakf* is to obtain the approval, of God, and when its application is provided for, both the affluent and indigent are equal in it. If no purpose is specified and the *wakf* is for a limited body of people, it is valid in respect of them; but not, if they are unlimited in number, unless the *wâkif* has used some expression which ordinarily or customarily or *in fact* implies *need*, *e.g.*, if the *wakf* is for orphans generally it is valid, and its benefit shall be applied to the poor among them and not to the affluent." All this, *viz.*, what the Shams-ul-Aimma says is applicable to a *wakf* in favour of strangers, and not to a *wakf* in favour of children and kindred.

Tahtâwi.

Page 528.

Text of the *Durr-ul-Mukhtâr.*—"According to both [Mohammed and Abû Yusuf,] it [*wakf*] means the detention of a thing in the ownership of Almighty God, and the application of the usufruct thereof for whomsoever he [the person making the *wakf*] likes, though that person may be rich. Consequently the *wakf* would be binding, he [the person making the *wakf*] not being competent to annul it, and it [the *wakf*] not being heritable. And on this is the *Fatwa;* Ibn Kamâl and Ibn Shahnah. Its object is to make one's self beloved in this world, and to obtain in the next the reward [of God], that is to say, if it is made by a person possessing the capacity to form an intention [*niat*], because it (making a *wakf*) is *mubâh* [lawful], inasmuch as it is valid even if made by an infidel, and sometimes it is *wâjib* [obligatory] on account of a vow." *Comment* of Tahtâwi:—"The author has added the words '*lau fil jumlati*' (if in any sense or at any time) admitting [or, accepting] what is said in the *Fath-ul-Kadîr.* Ibn Kamâl has adopted the same opinion. The *Fath-ul-Kadîr* says 'or spending the usufruct thereof for whomsoever he likes,' for the reason that a *wakf* is valid even if made in favour of the rich, without any intention of *kurbat* [an approach to God]. Such *wakf*, although its ultimate purpose must be for *kurbat* and permanency, will be a *wakf* even before the rich are cut off and even if there be no mention of giving alms to the poor, just in the same way as a *wakf* for the poor and for defraying the expenses of a mosque." This addition makes the definition comprehensive. The inference to be drawn from the [above] statement is that the object of making a *wakf* is doing a benefaction in any sense or at any time. This also appears from what is said in the *Muhît*, where it is stated that if a *wakf* be made exclusively restricted to the rich it will not be valid, as there is no *kurbat*, the case being quite different when it is last of all destined for the poor, for there is *kurbat* on the whole.

Page 529.

Text.—"Abû Yusuf considers the word ['*Moukoofa,*'] only as sufficient. Shâhîd says 'I also give *Fatwa* in accordance with the same having regard to customary practice.'" *Comment:*—"The author

says the word ['*Moukoofa*']. He [Abû Yusuf] says when a *wakf* is constituted by this word [alone], it is for the poor, and when it conveys a particular mode of application, *viz.*, a dedication for the poor, it necessarily becomes permanent, because the poor can never be extinct, *Bahr-ur-Râik*. He says: 'Sadr-us-Shâhîd says, and I also give *Fatwa* in accordance with the same.'" And the *Mashâikhs* [Jurists] of Balkh have also given *Fatwa* in accordance with it. *Fatwa* is given according to Abû Yusuf, who says a *wakf* shall be valid by the use of this word alone, though no mention be made of permanency or of the object in whose favour it is made.

Page 551.

Text.—"There are three kinds of *wakf*, (1) in favour of the poor, (2) in favour of the rich and then in favour of the poor, and (3) in favour of both equally, such as houses for strangers to put up in, houses for reception of travellers and strangers, burial grounds, reservoirs of drinking water for the use of travellers, bridges, and things like them, such as mosques, water-mills, and basins, inasmuch as every one is in need of them." *Comment.*—He [the author] says "or in favour of the rich and then in favour of the poor." But a *wakf* constituted *solely* and *exclusively* for the rich is invalid, because *kurbat* [seeking for nearness to God] is required in inception; and there can be no *kurbat* unless there is benefaction. This is what is given in the *Bahr-ur-Râik* from *Tartusi*.

GENERAL INDEX.

AARIAT—
ariat, 34 *et seq.*, 93.
difference between — and gift, *ib.*
a kind of bailment, 612.
definitions of, 615.
conditions, essential to, *ib.*
its legal effect, 616.
bailee liable, when, *ib.*

ACCEPTANCE—
of gifts, *see* Gifts.

ACKNOWLEDGMENT—
of *wakf*, see *Wakf* of a debt, *see* Debt.

ACTS—
Act XX of 1863, 441, 442.
—— XX of 1863, ss. 4—7, 442
—— XX of 1863, s. 18, *note* 3, 442, *note* 443.
—— IX of 1872, ss. 14, 15 and 16, 45 *note*.
—— IX of 1875, s. 3, 41
—— V of 1881 (Probate Act), 543.
—— XIV of 1882, s. 539, 444, 446.
—— IV of 1882 (the Transfer of Property Act), 34, 51, 126.

ADMINISTRATOR—
See Executor.

AGENT—
husband generally not the — of his wife 57.
powers of — to execute a *hiba*, same as those of his principal when specially authorised, *ib.*

IAD—
its validity depends upon what, 41.
every legal act, under the Mahomedan Law, *ib.*
of idiots, lunatics and persons *non compotes mentis*, 41 *et seq.*

AKHBARIS—
doctrine of the, 26.

ALIEN—
wakf in favour of an — enemy in valid (Shiah Law), 4
a *musta'min* may will away property to a Moslem or a *Zimmi*, when 513

ALIENATION—
of *wakf* property illegal, as a general rule, 383 *et seq.*
a burial ground cannot be alienated, 386.
lands in which there are tombs cannot be sold in execution of a decree, *ib.*
a heritable estate burdened with a trust may be alienated subject to the trust, 384
when the purchaser of *wakf* property is entitled to remove erections or to compensation after the sale has been set aside, 387.
private — of *wakf* lands, illegal, 385.
wakf lands cannot be transferred by sale or gift, *ib.*
wakf lands cannot be mortgaged, 373, 383, 385, 386, 630.
when may the *mutwalli* pledge *wakf* lands, 373, 386
a house appropriated for the residence of certain persons cannot be partitioned, 378.

ALLOTMENT—
Of the share of a legatee by the executor, 561, 562.

AL-UMRA—
a grant to a person and "his successor" conveys a life estate or — only, 109.
determined by the death of the grantor, 110.
determined by the death of the donee, when, *ib.*
See Estates.

ANNUITY—
bequest of an, 539 *et seq.*

APPROPRIATION—
See *Wakf*.

AQUEDUCTS—
See Cisterns.

ASNA 'ASHARIAS OR *IMAMIAS*, 12.
subdivisions of, *ib.*

ASSENT—
to a legacy must be free and voluntary, 480.
voluntary—given by the heir during the last illness of the testator, irrevocable, *ib.*

BAILMENT—
definition of, under Mahommedan Law, 612.
four kinds of, *ib.*
See *Adriat* and *Ijarâ*.

BEQUEST—
definition of, 459, 460, 527.
constitution of, 459, 460, 527, 542.
conditional or contingent, *ib.*
its legal effect, 533.
what words do and do not constitute, 527.
—— Shâfei doctrine, 582.
ambiguous, how determined under the Shiah Law, 528.
a legatee may reject part, and accept the remainder of a —, 533.
void without acceptance express or implied by the legatee according to all the schools, 532.
period within which acceptance of — must be made, Hanafi doctrine, 533.
—— (Shiah Law), 532.
—— (Shâfei Doctrines), 587.
what are lawful objects for, 481, 483, 484 *et seq.*, 488.
what may be the subject of—Shâfei Doctrines, 580 *et seq.*, 585.
anything movable or immovable over which the right of property may be exercised or which may be bartered or exchanged, or a fractional share thereof, or the usufruct of a thing may be the subject of —, 518.
remains valid and operative, though the subject-matter may have undergone a change or improvement, *ib.*
the legatee bears any loss or deterioration to the subject-matter of —, *ib.*
of a lawful object void, if subject to the condition that the legatee should commit an unlawful act, 519.
must be for a person or object actually or constructively in existence at the time of the disposition, 484.
not valid beyond a third of the testator's estate unless assented to by the heirs, 519.
—— (Shiah Law), *ib.*
—— (Hanafi Law), *ib.*
—— (Shâfei Doctrines), 581.
in excess of the disposable third will be reduced to the third, when the heirs do not consent (Hanafi Law), 496.
—— (Shiah Law), 497.
—— Shâfei Law), 581.
exceptions to this rule (Hanafi Law), 528.
—— (Shiah Law), 529.
not reducible to the third by the acknowledgment of a debt (Hanafi Law), 511.
effect of acknowledgment by a sick person, 511, 516 *note*.
when there are no heirs valid as to the whole, 480.

BEQUEST—(*Continued.*)
when two or more legacies exceed the disposable third, whether specific or indeterminate, the legatees take in what proportion, 496 *et seq.*
to an heir invalid without the consent of the others, according to all the schools, 477 *et seq.*
(Mâliki and Shâfei Laws), 480.
to an heir valid to a third without the consent of the other heirs (Shiah Law), 481.
of the third to a stranger valid without the consent of the heirs (Hanafi Law), *ib.*
to a relative not entitled to a share in the inheritance, 478, 479, 491.
in favour of one's *as'har* (Hanafi Law), 494.
to one's kindred (Hanafi Law), 488, 491.
to one's kindred (Shiah Law), *ib.*
to the nearest of kin (Hanafi Law), 492.
in favour of one's relations (*akriba*), 494, *et seq.*
ditto (Shâfei Law), 584.
in favour of the relatives of a stranger (Hanafi Law), 492.
"to the relations" of a certain person (Shâfei Law), 584.
to the orphan, the blind, or the people of a particular race or locality, 492, 495, 496.
in favour of the heir of A and A dies leaving several heirs (Hanafi) Law), 492.
to a particular family (Hanafi Law), 492, 496.
in favour of learned men (Shâfei Law), 584.
to a certain class (Shâfei Law), *ib.*
to several persons or to a class, (Shiah Law), 501.
to one's neighbour, 488, 491, 493, 494.
ditto (Hanafi Law), 493 *et seq.*
ditto (Shâfei Law), 584.
to an unborn child lawful according to all the schools, 486 *et seq.*, 579.
to an unborn child becomes void if still-born or born after six months from date thereof (Hanafi Law), 486, 487.
void, if still-born (Shiah Law), 487.
to a child in the womb (Shâfei Law), 579, 583.
to the poor (Hanafi Law), 488.
——(Shiah Law), 488.
——(Shâfei Law), 584.
to the Holy Shrine of Kaaba or any mosque, 488, 489.
for the support of a mosque (Shâfei Law), 579, 580.
for *Sabil illah* or in the way of God, 488, 490.
——(Shiah Law), 489, 490.
For good or charitable purposes, 488, 490.

BEQUEST—(*Continued.*)
for the children of one's heir, lawful, 484, 491.
to the children (*awlâd*) of the race of a particular person (Hanafi Law), 490.
for the payment of debts, 488, 492, 581.
for the emancipation of slaves, lawful, 488, 492, 582.
in favour of soldiers and "the unhappy," 491, 493.
effect of acknowledgment in death-illness, *note* 516.
by a person in death-illness, 463 *et seq.*
under the (Hanafi Law), 463, 464.
(Shiah Law), 465, 466.
(Shâfei Law), 583.
in favour of a strange woman by a sick person who subsequently marries her and then dies (Hanafi Law), 468, 516 *note.*
by a father in death-illness to a son who at the time was a non Moslem (Hanafi Law), *ib.*
to a son, who is a slave, by his father in death-illness (Hanafi Law), 469.
the death of the legatee in the lifetime of the testator does not cause a lapse (Shiah Law), 501.
——does cause a lapse (Hanafi Law), 501, 503.
to an alien infidel invalid according to all the schools, 481.
to an alien who is not a *mustâmin*, 513.
by an alien who is *mustâmin*, to a Moslem or a *Zimmi*, *ib.*
to an apostate invalid, 485.
to a non-Moslem not an alien, lawful, 484 *et seq.*
to a non-Moslem, whether an alien or not, invalid according to the Shâfei Law, 484.
to a slayer, 475, 476, 477.
to a slave (Shâfei Law), 580.
by a slave, 461, 579.
by an insane person, 462, 463.
of a third by way of *mushâa* (Shiah Law), 507.
to two or more persons in excess of the third, distribution of, 496 *et seq.*
in an indefinite form, 497.
of the share of the testator's son or daughter, 499 *et seq.*
of the third to A and Z, and A is dead at the time of the—501, 502 *note.*
a joint—to an heir and a stranger, 506.
to two persons jointly, one of whom becomes disqualified by the failure of a condition (Hanafi Law), 504.
in favour of existing objects or persons and one of them ceases to exist at the time of the *wasiat* (Hanafi Law), 503.
by a wife of half of her property to a stranger, 504.
BEQUEST—(*Continued.*)
by a husband of all his property to a stranger, where the widow will not consent, 504.
of a third to the sons of a particular person, 505.
of a third to one's *umm-i-walad*, and to *faktrs* and *miskins* (Hanafi Law), *ib.*
to a stranger and his heir (Hanafi Law), 506.
of things of different qualities, one of which is lost (Hanafi Law), *ib.*
an increase to the subject of a—in the lifetime of the testator forms part of the testator's assets; but an increase after death and partition or distribution of assets belongs to the legatee (Hanafi Law), *ib.*
a separable increase to the subject of—(Hanafi Law), 505.
assent of heirs to—(Shiah Law), 507.
specific—(Shiah Law), 508.
repugnant to each other (Shiah Law), *ib.*
in terms applicable to several things, the heirs have the right of selection (Shiah Law), 509.
of the services of a slave or of anything of a usufructuary nature (Shiah Law), 508.
of the portion of an heir (Shiah Law), 509, 510.
to the poor of property, situated in different places (Shiah Law), 510.
of a mansion which falls down (Shiah Law), 511.
of a fixed sum to A and the poor (Shiah Law), *ib.*
for religious purposes by a Christian (Hanafi Law), 512, 513, 514.
by a Jew (Hanafi Law), *ib.*
by *Zimmis*, of four kinds (Hanafi Law), 512, 514.
by a *Zimmi* in excess of the third in favour of a strange, or heir invalid (Hanafi Law), 513, 516.
of property to a Mussulman or *Zimmi* by a *mustâmin* valid (Hanafi Law), 513, 515
of specific sum of money and the testator leaves actual property and outstanding debts, 520.
when two legacies are given to the same person (Mâliki and Hanafi Laws), *ib.*
in general and special terms, 521.
of a son's share to a grand-child, 522.
for the performance of religious duties, and pious purposes and works, how carried into effect (Hanafi Law), 523.
for the performance of certain duties some of which were obligatory on the testator and others merely discretionary, how carried into effect (Shiah Law), 524.
for a pilgrimage on behalf of the testator (Shâfei Law), 585.
usufructuary—lawful, 534, 585.

BEQUEST—(*Concluded.*)
effect of an usufructuary —, 534.
an usufructuary — may be for a limited period or in perpetuity, *ib.*
an usufructuary — for an indefinite period is regarded in perpetuity, *ib.*
if the subject of the—falls within the third of the testator's estate, the usufruct will be given to the legatee, *ib.*
if the subject of the — does not fall within the third, the legatee will get the benefit of the portion covered by the third, 535.
when the legatee dies before the expiration of the term of the—it reverts to the heirs, *ib.*
of the service or produce of a slave, 535, 536.
of the usufruct of a slave (Shâfei Law), 585.
of the occupancy or produce of a house, 534, 535, 536.
of the produce of a garden or land, 537, 538.
of the service of a slave, the produce or occupancy of a house or garden (Shiah Law), 541.
of principal and accessory to different persons, 538.
of an annuity, 539 *et seq.*
revocation of—may be made at any time, 529.
——may be express or implied, *ib.*
four modes of revocation, 529 *et seq.*
——how made (Shiah Law), 531.
——(Shâfei Law), 585.
a mere change in, does not amount to a revocation (Hanafi Law), 530.
when a subsequent — of the same thing is a revocation of the first (Hanafi Law), *ib.*
something to another person makes the second legatee a partner with the first (Hanafi Law), *ib.*
pledging the subject of a—not necessarily a revocation of it (Hanafi law), 531.
of a mansion or land, what is, and what is not a revocation of it (Hanafi Law), *ib.*
revoked by the sale and gift of the subject of (Mâliki and Shâfei Laws), 531, 585.

CALIPHATE—
cause of its downfall, 13, 14.

CARAVANSERAI—
dedication of, how made, 315.
in the use of a—no distinction between the rich and poor, 316.

CEMETERY—
dedication of, how made, 315.
when a body buried in the ground may be lawfully exhumed, 316.
khiraj abates from land converted into, 317.
a grave dug by a person may be appropriated by another when there is no other available space in the, *ib.*

CEMETERY (*Concluded.*)
land converted into a—may be sold when overflown by water and unfit for the burial of the dead, 317.
land for a — may be sold, when, 317, 322.
cannot be alienated or portioned, 317.

CESTUI QUI TRUST—
may not of his own motion change the nature of the endowment, 328.
cannot hypothecate *wakf* property, 375.
cannot grant a lease for a long period (Mâliki Law), 434.
not entitled to partition, 276, 630.
the poor are the ultimate beneficiaries of a *wakf*, when no others have been specified, 169, 325.

CHOSE IN ACTION—
may be the subject of gift, 66, 90, 91.
assignment of, not invalid under Shiah Law, 90, 91.

CHRISTIAN—
may will his house for religious purposes, 512, 513.

CISTERNS—
dedication of—and wells how made, 315.
in the use of—no distinction between the rich and poor, 316.
the *wakf* on a reservoir in ruins and not needed may be spent on another reservoir, 320, 321.
the materials of a well or reservoir may be used for building another, when, *ib.*

COMMODATUM—
See *Ârîat.*

CONSIDERATION—
See *Ewaz.*

CONTRACT—
requisites for a valid — 41 *et seq.*
of minors, 41.
of idiots and lunatics, 42.
of a person drunk at the time of, entering into the — will be set aside, 43.
obtained by fraud or imposition or contrivance from a person under the influence of liquor set aside, when, *ib.*
of imbeciles, valid unless obtained by fraud, 44.
were imbecility or *safihat*, no inhibition to a—*ib.*
by a bondsman or slave not valid, unless ratified by his master, 45.
made under duress or undue influence valid if subsequently ratified, *ib.*
infancy, slavery, and *junân* three causes of inhibition to, according to the *Heddya*, 42.
voidable, if obtained by duress or *ikrah*, 45.

CONSTRUCTION—
rules as to the interpretation of bequests and devises (Hanafi Law) 492.

COMPULSION OR *IKRAH*—
doctrine of, 45 *et seq.*

CREDITOR—
gifts in fraud of, void, 48, 49, *note.*
may recover debts from the heirs after partition, 572.
whether discharge by a—,must be accepted by his debtor, 91, 92, 133, 135.
rights of, as regards *wakfs* by debtors, 164 *et seq.*

CY PRES DOCTRINE—
applicable to *wakf*, 325.
ditto, *wakfs* for a good or charitable purpose or for an object of general ultility which has failed, 404, 405.

DEBT—
acknowledgment of—prevents the reduction of legacies to the disposable third, 511.
——by a sick person in favour of a strange woman, 468, 469, *note* 516.
——by a sick person in favour of his son, 468, *note* 516.
——of—due to a non-Moslem son, 468.
——of—due to his son who is a slave, 469.
——in death-illness of a—,the amount being unknown, *ib.*
——difference between it and a gratuitous disposition in death-illness or contemplation of death, 467.
payment of—by executors, 572 *et seq.*
gift of a—to a debtor valid (Hanafi Law), 58, 67, 133.
——(Shiah Law), 58, 66, 90, 91, 145 *et seq.*
——(Shâfeï Law), 150.
——by the creditor to his debtor equivalent to a discharge or release, and is complete without acceptance, 91, 92, 133, 135, 145.
——to the debtor entitles him to recover from his creditor any *mál* pledged for it, 135.
——to a person other than the debtor, valid when, *ib.*
——invalid (Shâfeï Law), 150.
——to the principal debtor, its affect as regards him and his surety, 92, 134.
gift of—to the surety, incomplete without acceptance, *ib.*
——irrevocable when once the debtor has consented to the discharge, 136.
gift of—or release from a—cannot be subject to the option of a stipulation, 132.
contingent gift of—to a debtor, 135.

DEBT—(*Concluded.*)
gift of—upon a condition which is immediately fulfilled, valid, 135.
dower-debt, *see* Dower.

DEATH-ILLNESS—
death-illness (*marz-ul-mout*).
——, definition of, 53, 56.
——applicable not only to diseases which actually cause death, but also to those which are likely to result in death and cause an apprehension of death (Hanafi Law), 56.
—— (Shâfeï Law), 580.
a malady of long continuance is an illness which has lasted for a year and there is no immediate apprehension of death, *ib.*
gift by a person in—invalid (Máliki Law), 51.
——, valid as to the whole, if possession is given to the donee in the lifetime of the donor; but subject to the rules governing testamentary dispositions if the donor dies without delivery of possession (Shiah Law), 51, 53.
valid, as to a third (Hanafi Law), 53.
gift by a person suffering from a malady of long continuance, provided he be of sound mind and there be no immediate apprehension of death, is valid, 56.
——, if donee be an heir, not valid without the consent of the other heirs, 57.
gift in lieu of dower-debt by a woman in—54, 57.
capacity of a person in—to make a will, 463 *et seq.*
a person in—cannot dispose by will more than a third (Shâfeï Law), 383.
effect of a bequest made in a—466, 583.
wakf in—valid to a third without the consent of the heirs (Shiah Law), 396.
acknowledgment of debts in favour of a strange woman, *note* 516.
—— of a son, *ib.*
gifts in—*see* Gifts.

DISPOSITION—
of property, by a Mahommedan, governed by Mahommedan Law, 1—4.
of property, two kinds of, 34.
of property by way of *gift*, *see* Gift.
testamentary power of, *see* Will.
difference between—of property *inter vivos* and bequests, 397.
made in death-illness, *see* Gifts, *Wakf*, Wills.
inter vivos, legal, although a larger share be given thereby to one heir than to another, 39.
conditions necessary for the validity of any, 41 *et seq.*
of property by a minor, 41.
of property by a person *non compos mentis*, 42 *et seq.*
of property by a slave, 45.

DISTRIBUTION—
according to *Farâiz-ullah*, 301.
of the income of a *wakf* when *per stirpes*, 272.
——when *per capita*, 273.
—— of produce when the proportions in which males and females are to take are not mentioned, 269.

DONEE—
See Gifts.

DONOR—
See Gifts.

DOWER—
gift of, by the mother to her infant child, valid, 137.
——obtained by a husband by force or fraud, invalid, *ib.*
——in exchange for something else, *ib.*
——by a woman in labour to her husband invalid if the woman dies during the *nifas*, 54.
gift in lieu of dower-debt in death-illness not governed by the Mahommedan Law relating to gifts, 57.
gift of —by a woman to her deceased husband's estate, valid, 138.
——on certain conditions which are not fulfilled, void, *ib.*
——in death-illness, *ib.*

DRUNKENNESS—
invalidates a gift or contract, when, 43, 44.

ENDOWMENT—
See *Wakf.*

EMANCIPATION—
a slave may be emancipated by a *mustâmin* while living, 512.

ESCHEAT—
none to the *Bait-ul-mâl* or public treasury, according to the Shiahs, 10.
to the spiritual Imâm, *ib.*
to the spiritual Imam's representative, the Mujtahid, *ib.*

ESTATES—
limited estates recognized by the Shiah Law, 109, 111, 149 *et seq.*
—— (Muliki Law), 432.
hubs, 109.
estate for life or *al-umra*, *ib.*
right of habitation or *as-sukna*, *ib.*
enjoyment of the usufruct for a fixed period or *ar-rukba*, *ib.*
life estates take affect as a *hiba* (Hanafi Law), 108.
no special words or formula necessary for their creation, 109, 142.
determined by death of grantor or grantee, 110.
are revocable, *ib.*
a succession of life-estates are valid, 111.

ESTATES—(*Concluded.*)
in a grant to A and his children generally or to his children's children, the terms "generation after generation, line after line," are words of description not of limitation, 141.
a grant to A and his children generally or to his children "generation after generation, line after line," conveys a fee simple, 141, 111.
a grant to A and "his successors," under the Shiah Law passes only a life estate to A, 141.
a grant to A for life valid. A grant to A for life with remainder to another *in esse* valid (Shiah Law), 142.
See Gifts.

EVIDENCE—
when there is a dispute as to the delivery of a gift burden of proof is upon which party (under the Shiah Law), 143.
admissible to explain the meaning of words in a *wakf*, 338, 394.
of reputation may establish a *wakf*, 377 *et seq.*

EWAZ—
two kinds of, may be stipulated for at time of the contract of gift or subsequent to it, 127.
(subsequent to the gift) its conditions, *ib*
—— nature of, *ib.*
stipulated for in the gift, effect of, 128.
for a gift bars revocation, *ib.*
may be revoked by the donee when, *ib.*
—— illustrations of, 129.
—— be revoked by the donee when, 128.

EXECUTOR—
definition of, 549.
also the personal representative of the testator, *ib.*
three kinds of, *ib.*
difference in the position of an —under the English Law and that of an—under Mahommedan Law, 548 *note.*
appointment of, may be general special, 544.
—— how made, 550.
—— (Shâfei Law), 587, 588
—— complete, takes effect upon acceptance, 549.
acceptance of the office of the—may be by word or deed and may take place in the testator's lifetime or after his death (Hanafi and Shiah Law), 549, 550.
Cannot renounce his office after acceptance 550.
Who may be appointed, 544 *et seq*, 587.
Qualifications requisite in an—(Shiah Law), 548.

EXECUTOR —(*Continued.*)
when none appointed who may administer, 572, 577.
wasi or guardian may be appointed for every person over whom the *patria potestas* of the Mahommedan Law can be exercised, 576.
may be appointed, when the father is wasting the estate of his infant child, 568.
wasi in the lifetime of the grandfather (Hanafi Law), 575.
may not be appointed in the lifetime of the grandfather (Shiah Law), *ib.*
slave of another cannot be, without the consent of his master, 548.
an alien infidel cannot be, 545.
but a *Zimmi* or non-Moslen fellow-subject may be appointed, *ib.*
a minor cannot be appointed —, but if appointed, he should be removed by the Judge, 544.
when one of the executors is a minor, the adult — may alone act until the minor attains puberty, 545.
for special purposes (Hanafi Law), 576.
cannot appoint by will an — to the original testator (Shâfei Law), 587.
one of two executors may not act alone, excepting under special circumstances (Hanafi Law), 551 *et seq*, 559, *note*.
—— (Shiah Law), 554.
—— may not act alone when both have been appointed by the Kazi, 552.
—— may act alone when his co-executor is absent in a distant town, 553.
—— may not act alone (Shâfei Law), 588.
when one of two executors dies, appointing his co executor his own —, the latter can act singly, 555.
the—of an—, the—and representative of the original testator (Hanafi Law), 555.
——, (Shiah Law), 557.
a derivative —, powers of, (Hanafi Law), 555, 576.
——, (Shiah Law), 557, 577.
on the death of one of two executors the Kâzi must appoint another in his place, 560.
the powers of executors appointed in general terms or jointly (Shiah Law), 554.
for special purposes (Hanafi Law), 576.
effect of the ratification of an — by his co-executor, 552.
effect of a direction that the—should consult another, 557.
when an — may entrust the testator's estate to his own — (Shiah Law), *ib.*
powers of, when absolute, 561.
—— when all the heirs are minors, *ib.*

EXECUTOR—(*Continued.*)
powers when some of the heirs are adults and absent, 561.
the powers of, to pledge the property of an infant, 569.
powers of, when appointed by the mother or other relative, 562, 573.
partition by, among heirs and legatees, 561.
—— among heirs when they are all minors, unlawful, 562.
sale by, of testator's property lawful, when, 563 *et seq.*
—— of orphan's property to himself or his own to the orphan invalid, 564, 565 *note*
—— when there are no debts or legacies, 563 *et seq.*
—— when there are debts and legacies, 570.
—— for payment of debts when lawful, 578.
may allow customary credit on a sale of goods, 569
cannot trade on his own account with the goods of an infant, 568.
may let out infant's property, when, 569.
—— not mortgage without the leave of the Kâzi, *ib.*
—— sell or pledge chattels for the maintenance of infants, *ib.*
payment of debts by, 574 *et seq.*
must not spend at the testator's funeral more than is customary, 569.
cannot enter into a contract of marriage on behalf of a minor (Shâfei Law), 587.
—— borrow from funds in his hands belonging to an infant, 571.
—— take anything beyond his fixed allowance, *ib.*
—— bind the testator's estate by the acknowledgment of a debt or the right to a share in it, *ib.*
can repay himself any expense incurred on behalf of the infant or estate, 574.
liable for a debt contracted on behalf of a minor without necessity, 563.
—— for payment of debts without sufficient proof and a Judge's order, 574.
—— for loss when property is delivered to an infant and lost, 569.
—— for loss arising out of a sale or purchase on behalf of an infant, *ib.*
—— for loss or destruction of the testator's property, when (Shiah Law, 575.
a gratuitous, cannot be compelled to administer the estate of the testator, 571.
also trustee or *mutwalli* of a *wakf*, when, 364.
guardian of an infant, when, 572.
—— grandchildren, when, *ib.*
the Kâzi may appoint an administrator when the executor is absent, 561.

EXECUTOR—(*Concluded.*)
what class of executors may be removed by the Judge, 548.
a *Zimmi*, may be removed, 545.
an — unfit, or incapable of, to discharge his duties should be removed, 545, 546.
—— insane or dishonest, should be removed, 555.
may be removed, without his knowledge or consent, 551.
must be removed for notorious bad conduct (Shâfei Law), 587.
a minor may be removed by the Kâzi, 544.
difference between the acts of a minor — and those of a non-Moslem or slave —, 547.

FEE-SIMPLE—
what words will create an estate in, 110, 111.

FIDUCIARY RELATIONSHIP—
the doctrines of the English Courts of Equity applicable to cases of, 47.

FOSTERAGE—
relationship arising out of no bar to the revocation of the gift, 122.

GIFT (or *Hiba*)—
its object in Mahommedan Law, 39.
definition of, 34, 40.
—— in the Transfer of Property Act, *note*, 34.
—— (Hanafi Law), 40.
—— (Mâliki Law), *ib.*
—— (Shiah Law), *ib.*
—— (Shâfei Law), 149.
of two kinds, 34, 127, *note*.
sadakah, meaning of, 40, 149.
gratuitous, meaning of (Shiah Law), 173.
distinction between *Hiba* and *adriat* or commodatum, 34 *et seq.*
—— a gift which is *bâtil* (void) and a gift which is *ghair mukammull* (incomplete), 86.
—— a conditional — and a — with a condition, 107, 132.
conditional gifts, which are made dependent for their operation upon the occurrence of certain contingencies, void according to all the schools, 107.
with a condition, — is valid whilst the condition is void (Hanafi Law), 108.
both condition and — valid, if condition is subsidiary to the — (Shiah Law), *ib.*
of land subject to a condition that the donee should give the produce thereof to the donor for his support, if the land be culturable and not waste, — valid and condition void (Hanafi Law), 114.
whether land culturable or waste, both — and condition valid (Shiah Law), *ib.*
of the *corpus* with a reservation of a life-interest in the proceeds, valid, *ib.*

GIFT—(*Continued.*)
of a thing lost, "when recovered" bad, 116.
of an enforceable right, valid, 116, 132.
with an option to the donee to accept or not, option must be exercised at the place when the — is made, *ib.*
with an option to the donor to revoke at pleasure, — valid, option void, 116.
on condition that donor have an option, — valid, option void, 132.
a — is not void for an invalid condition, 116.
—— (Hanafi Law), 132.
examples of contingent gifts, 133.
indefinite words of, must be limited by the purpose of the —, 101, *note* 3.
may be made verbally or in writing, 40, 93.
Transfer of Property Act leaves untouched these provisions of the Mahommedan Law, 40.
constitution of—no formality nor special publicity necessary for, 93.
—— what words are sufficient for (Sunni Law), 94 *et seq.*
—— (Shiah Law), 142.
—— (Shâfei Law), 108, 149.
requisites for the validity of, 40, *et seq* 94.
—— (Shiah Law), 90, 144.
—— (Shâfei Law), 149.
seisin, necessary for the validity of, 94 *et seq.*
inoperative, without actual or constructive seisin or *ikbaz*, 95.
seisin how to be effected, 99.
delivery of —, seisin, when necessary, 95, 96.
authority to take possession sufficient to complete, 96.
ability or power of donee to take possession sufficient to validate a —, *ib.*
delivery of possession unnecessary when donee already in possession of the subject matter of, 102.
—— (Shiah Law), 142.
possession of the donee must be with the consent of the donor (Hanafi Law), 96, 97.
—— (Shiah Law), *ib.*
donee entitled to possession of, when, 101, *note* 3.
invalid, validated by possession, 71, 73, 74, 95.
when the character of the possession is changed, the — will be valid although it remains in the possession of the doner, 95.
See Further Seisin.
Conditions relating to the donor, —
That the donor be not an infant, 41.
—— be not an idiot, a lunatic, or a person *non compos mentis*, 42, 44.
—— be not so drunk as to lose his reason and understanding, 43.

GIFT—(*Continued.*)
that he be free, 45.
—— has not made the — through *ikrâh* (compulsion,) 45, 48.
—— be the owner of the subject-matter of the —, 48.
by an insolvent or in fraud of creditors void, 48—51.
a married woman is not barred by marriage from making a —, 51.
by a person in death-illness, *see* Death-illness.
may be made to any person in existence, 57.
to a child *en ventre sa mère* valid, if the child is born within six months from date of gift, *ib.*
to an unborn child valid (Shiah Law) 58.
Shiah Law relating to—summary of; 139—148.
the Shiah and Hanafi schools with respect to, the principle features of difference between, 139 *et seq.*
umra or life-grant, takes effect as a *hiba* (Hanafi Law), 108.
mere grant of the usufruct in a thing, is an *ârîat*, *ib.*
limited estates recognised by the Shiah Law, 109, 111.
no special words necessary for creating *hubs al-umra*, *as sukna* or *arrukba*, 109 *et seq.*
a grant of *sukna* in general terms does not empower the grantee to transfer his rights to another, 110.
—— the usufruct for a fixed period or limited estate, its effect, 110, also *note.*
an indefinite period may be revoked at the will of the grantor, *ib.*
to a person and "those whom he leaves surviving" conveys a life-estate only, 110, 111.
grant to A and his *akab* conveys a life-estate, 110.
—— in favour of definite individuals without specification of time, effect of (Shiah Law), 111.
a succession of life-estates valid (Shiah Law), *ib.*
grant to A and his heirs generation after generation or to A and his descendants conveys an absolute estate (Shiah Law), 111 *et seq.*
what may be the subject-matter of, 58 *et seq.*
—— (Hanafi Law), 67.
—— (Shâfei Law), 149.
of a larger share to an heir, lawful (*Alamgiri*), 39.
of incorporeal rights and choses in action, valid, 58.
of a debt, *see* Debt.
of Government Securities, valid, 59.
of Malikana rights, valid, *ib.*
of lands in the occupation of tenants, valid, 59, 62 *et seq.*
of lands in possession of an usurper, its effect, 61.
of lands in the possession of a mortgagee, its effect, *ib.*

GIFT—(*Continued.*)
of *Mushâa* (Hanafi Law), 68, 69 *et seq.*
—— (Shâfei Law), 68.
—— (Shiah Law), 68, 89 *et seq.*
—— possession validates, 71, 73, 74, 95.
actual possession not necessary, authority to take possession sufficient, 75, 90.
—— in a thing incapable of partition valid (Hanafi Law), 68, 77.
—— in a thing capable of partition, invalid unless partition be made before delivery (Hanafi Law), 68 *et seq.*
rendered valid by means of the doctrine of *tahlil*, 87.
—— illustrations of the doctrine of *tahlil* 78, *et seq.*
of a mansion on which there are effects of the donor, 71, 72.
of shâgil or thing which occupies another is lawful; but gifts of Mushghûl or thing occupied is unlawful, 72.
of a thing rendered void, if right be established in part thereof, 73.
of a share in the profits by one partner to another, lawful, *ib.*
of specific share in zemindaris paying revenue separately, valid as the doctrine of *mushâa* does not apply to such, 75, 76, 77, 78.
of undivided joint property (*hibabil-mushâa*) is not void, but only invalid and possession remedies the defect, 74.
in such a — the quantity must be known or specified, 77.
of (*muafi*) share to two persons held valid, 78.
of a share in joint property by one co-sharer to another, valid, 81.
of property jointly to two donees with power to make parties among themselves or to take possession, valid, *ib.*
jointly to an adult and a minor, the latter being in the custody of the former, or two sons, one adult and the other minor, invalid on the ground of *Shuyuâ*, 81, 86.
device to evade the operation of the principles of *Shuyuâ*, 86.
of a moiety of a house, how validly made, *ib.*
of one of two things of equal weight and purity, 87.
by *tahlil*, 87, 89.
to two person, jointly valid (Shiah Law), 90.
of immovable property when made in writing, subject to the Stamp and Registration Acts, 93.
may be made to any person in existence, 57.
to a child *en ventre sa mère* invalid, when, *ib.*
to a child by a parent lawful, 106.
—— at circumcision, *ib.*
to a minor by father or grandfather valid (Shiah Law), 141.

GIFT– (*Concluded.*)
to minors, what seisin necessary for its completion (Shiah Law), 141.
to an infant by a stranger, seisin may be taken by whom, 103, 105.
when may an infant himself take possession of a — to himself, 104.
to a minor son by his parent, acceptance unnecessary, when, 102.
of a child's property invalid even for a consideration, 107.
for a fixed consideration lawful, (Shâfei Law), 151.
for an unfixed consideration void (Shâfei Law), *ib.*
of debts, *see* Debts.
of dower, *see* Dower.
in the way of God, see *Sadakah*.
the thing in which a present is delivered, is considered part of the present (Shâfei Law), 151.
of property among children in equal shares without distinction of sex, lawful (Shafei Law), *ib.*
when the donor or donee dies before completion of, who is entitled to it (Shâfei Law), *ib.*
to an orphan, who may take possession on his behalf, 104.
to an infant wife, who entitled to possession, 104, 106.
to a person, *non compos mentis*, who entitled to possession, 106.
to a *latîk* or foundling, who entitled to possession, *ib.*
in *jahâz* to a bride, taken to the house of the husband, 105.
presents to a bride, 107.
when a house is once given to an infant, and the donor purchases another house with the proceeds thereof, the latter is the property of the minor, *ib.*
jointly to two donees, one of whom is a minor, 81 *et seq.*
to one child, in exclusion of the others legal but sinful, 136.
to one or more children in preference to the others by father, lawful, 142.
to A without words of limitation, A takes absolutely (Hanafi Law), 109.
life-grants, 139 *et seq.*
by way of *rukba* invalid according to all schools of Sunni Law, 138.
in death illness, *see* Death illness.
of a chose in action, *see* Chose in action.
revocation, *see* Revocation.

HEIRS—
who is an heir, 478.
bequests to, *see* Bequest.
wakf on, see *Wakf*.

HIBA—*See* Gift.
hiba-ba-shart-ul-ewaz or gift with a condition of exchange, its requisites and effect, 128, 131, 132.
—— the effect of *shart* (condition) attached to a gift, 131.

HIBA—(*Concluded.*)
gift and release do not admit of the option of a stipulation, 132.
hiba-bil-mushâa or gift of an undivided joint property is not void, but invalid only and possession remedies the defect, 74.
—— in such a gift quantity must be specified, 77.
hiba-bil ewaz or gift for an *ewaz* or consideration, irrevocable, 128.
—— a sale in all its legal incidents, 130.
—— seisin not necessary, *ib.*

HUBS—
definition of, 109.

IJARA—
definition, 612.
common bailee, what is a, 615.
—— liable for loss of deposit, when, *ib.* *a*
particular bailee, what is a, *ib.*
—— liability of, governed by contract, *ib.*
surgeon or farrier, acting agreeably to customary practice, not liable in case of accident, *ib.*
gratuitous bailee responsible for ordinary care, *ib.*
tenant is liable for the stipulated rent or, when none fixed, for the customary rent, 612.
when the contract of bailment is unqualified or absolute, bailee at liberty to give the use of the deposit to any person, 613.
otherwise, when contract is special, and bailee is liable for any loss in consequence of any deviation from the terms thereof, 613, 614.

IKBAZ—See Seisin.

IKRAH OR COMPULSION—
doctrine of, explained, 45 *et seq.*
not confined to actual duress or restraint or even threats, but extends to all cases where a person is deprived of his free will, 47.

IMAMIAS OR ASNA ASHNARIAS, 12.

IMAMATE—
doctrine of, 5.
distinctive features of difference between the Sunnis and Shiahs, *ib.*

IMBECILITY—
invalidates gifts and contracts, 41, 42, 44.

INFANTS—*See* Minors.

INHERITANCE—
females take smaller shares than sons, 39.
the children of a daughter excluded from the — in preference to brother's sons, *ib.*
where ground is appropriated for the erection of a mosque, it cannot be inherited by any person, 315.

INHERITANCE—(*Continued.*)
a synagogue built by a Jew descends to his heirs on his death, 513.
a church built by a Christian goes to his heirs on his death, *ib.*

INNS—
See Caravanserai.

INVESTMENT—
alteration of, *wakf* property, 330 *et seq.*
the proceeds of *wakf* property may be invested in dirhems and dinars, 337.
proceeds of *wakf* property may be invested in Government securities, *ib.*
wakf property may be sold and proceeds invested in other property with the sanction of the Kazi, 337, 341 *et seq.*

ITJIHAD—
ijtihad, 24.
three degrees of, recognised by Sunnis, *ib.*

JEW—
a—may will his house for religious purposes, 512, 513.

JURISPRUDENCE—
Islamic, its position, 4.
Islâmic — founded on the Koran, not sayings of the Prophet, *ib.*
Islâmic — compared with other systems of —, *ib.*
Sunni, elements of, 8, 9.
Shiah, elements of — 8, 10, 26.

JURISTS—
Sunni —, classification of, into 7 classes by D'Ohsson, *note* II, 30.

KAZI—
duties of, when there is a conflict of opinion and no written law to guide him, 15.
may remove a *mutwalli* who is a slave or a *Zimmi*, 351.
may remove a *mutwalli* for breach of trust, misfeasance and the like causes, 366, 367, 368.
may appoint a substitute, when the *mutwalli* is under a temporary disqualification, 358.
sanction of, necessary for the appointment of *mutwalli*, when, 364, 365.
—— necessary to enable a *mutwalli* to retire from his office. 357.
may appoint trustee when, 350, 354.
—— an outsider *mutwalli*, although the members of the *wâkif's* family be living, 355 *et seq.*
—— a co *mutwalli*, when beneficial, 350.
—— authorise a longer lease than that provided for by the *wâkif*, 379, 381

KAZI—(*Concluded.*)
may sanction the mortgage of *wakf* property or a charge on it, 373.
may sanction a debt for the repairs of *wakf* property, 373—375.
has power to fix and increase the allowances of the *mutwalli* and other servants of the *wakf*, 372.
cannot be deprived of his power of interference in the management of a *wakf*, 336.

LAW—
lex loci, none in India, 1.
in India, chiefly personal, *ib.*
personal, restricted to Mahommedans and Hindus, 2, 3, 4.
of Mussulmans relating to inheritance and dispositions of property preserved by the Legislature, 1, 2, 3.
Mahommedan — applicable to other matters besides inheritance, marriage and caste, 2, 3.
Mahommedan — founded essentially on the Koran, 5, 8.
no distinction between ancestral and self-acquired property under Mahommedan —, 33.
rights of owners absolute over both kinds of property, during life and restricted to a third to a disposition by will, *ib.*

LAND—
dedicated for a pious purpose, may be sold, when, 317—322.
dedicated for a cemetery, may be sold, when, *ib.*

LAPSE—
the death of a legatee causes the legacy to — under the Hanafi Law, not under the Shiah Law, 501.

LEASE—
granted by *mutwalli* not cancelled by his death, 380.
the lessee of *wakf* property may plant trees or make erections, 380.
of *wakf* property may not be granted to a relative of the *mutwalli* without reserving a rent higher than the proper customary rent, 381.
neither *cestui qui trust* nor *mutwalli* can grant a — of *wakf* property for a long period (Maliki Law), 434.

LEASES—
in the absence of any provision in the *wakfnamah*, the *mutwalli* may grant a lease of land for what periods, 378 *et seq.*
of a house for not more than one year, 379.
of culturable land for not more than three years, *ib.*
the Judge may authorise the grant of a lease for any term advantageous to the *wakf*, 379, 381.
the *mutwalli* must reserve the proper customary rent, 379.

LEGATEE—
allotment of the share of a — by the executor, 561, 562.
death of — causes the legacy to lapse under the Hanafi Law, but not under the Shiah Law, 501, *see* Bequest.

LUNGAR-KHANEH—
meaning of, 302, *note*.
materials of a —, may be sold when and for what purpose, 322.

MAJORITY—
three ages of, under Act IX of 1875, 41.
the age of — under the Mahomedan Law, *ib*.

MARRIAGE—
Mahommedan Law to be observed by the Judges in suits relating to — and caste, and all religious usages and institutions, 1—4.
during — a married woman may make any disposition as if a *femme sole*, 51.
no bar to a married woman making a gift, *ib*.
relationship arising out of—no bar to the revocation of a gift, 122.

MARZ-UL-MOUT—
See Death illness.

MINORITY—
See Majority, *see* Minors.

MINORS—
effect of disposition of property by —, 41.
gifts to—when complete, 103.
—— when acceptance or possession unnecessary, 104 *et seq*.
presents to—when property of the —, 106.
gift of dower-debt to—when valid, 105.
gift to an infant wife, 106, 107.
presents to an infant bride when property of the bride, 107.
sadakah to — by father while living in it, valid, 105.
gift of the property of — invalid even for a consideration, 107.
when a house is given to a minor and with the proceeds thereof another is purchased by the donor, the latter belongs to the minor, *ib*.
may not be appointed *mutwalli*, 544.
may be removed, *ib*.
acts of a minor executor, *ib*.
capacity of an infant to make a will, *see* Will.
who is the guardian of an infant, 573 *et seq*.

MORTGAGE—
of *wakf* property, may be made with the sanction of the Kazi, 373, 386.
the mortgagee in possession liable for damages where — is made without such sanction, 372.
of *wakf* lands illegal, 372, 375, 385.

MOSQUES—
a mosque belongs to no particular sect, 310.
musalla, meaning of, 304.
constitution of a *wakf* for, how made, 304 *et seq*., and 624, 637.
—— once offering up prayers sufficient, 306, 624.
—— consignment to a *mutwalli* sufficient, 307.
what may be the subject of *wakfs* for, 307 *et seq*., and 624.
place where the *namáz-id* or *namáz-i-janáza* is usually performed, subject to the same rules as —, 308.
will in favour of a mosque valid (Shâfei Law), 580.
the public do not acquire any right in a private mosque, without special permission, 305.
right of the *Ahl-i-mahulla*, or people of the locality to enlarge or reconstruct or improve, 308, 319.
room in a private residence set apart for family prayers not a *wakf*, 309.
dedication of rooms in a building as a mosque valid, when, *ib*.
when the purpose of a *wakf* fails, the income may be applied to kindred objects, 314, 321.
when there are two or more *wakfs* attached to a mosque, the income of one may be applied for the benefit of the other, when, 314, 315.
the *wakf* on a masjid which is in ruins and not needed, may be spent on another masjid, 321, 322.
a ruined mosque may be sold for what purposes, 319.
the materials of a ruined mosque may be applied to another mosque, 314, 320.
Mookoof alaihim, see *Wakf*, its Objects.

MUFTI—(Jurisconsult and Judge.)
duties of, 15.

MUJTAHIDS, 24.
Imâms, 15.
three orders of, 25.
position in jurisprudence of the first order of, *ib*.
—— second order of, *ib*.
—— third order of, *ib*.

MUSTAMIN—
may bequeath property to a Mussalman or *Zimmi*, 513, 516.
may emancipate his slave, 516.
will in favour of a —, resident in a Mussulman country, 516.

MUSHAA—
definition of (Hanafi Law), 69.
gift of, *see* Gift.

MUTAZALAS—
doctrines of the school of, 12.

MUTWALLI—
appointment of, sanction of the Judge necessary for, when appointment made by beneficiaries, 656.

MUTWALLI—(*Concluded.*)
who may appoint, when the *wâkif* has made no appointment, 630.
last — may appoint his successor, when, 354.
appointment of, by the congregation, 364, 365.
who may appoint the *muezzin* and *imâm* to a mosque, 369, 371.
Qualifications for the office of, puberty (*bulâgh*) and understanding (*akl*), 350.
Appointment of a minor as —, *ib.*
—— freedom and Islâm not necessary qualifications, 351.
qualifications and duties of (Shafei Law), 438.
who may be appointed, 346 *et seq.*
women may be, 347.
but not, if the — is also the superior of a religious establishment, 348.
—— a *wâkif* may appoint himself or any other person, 347 *et seq.*, 629, 653.
—— when a class is specified, the person answering to the description, 354.
—— preference must be given to the members of the *wâkif's* family over strangers for the office of, 355, 625, 626, 630.
a stranger may be appointed, when, 357.
which of a class may be appointed, where intelligence and excellence are required, 360, 369.
may be removed for breach of trust, misfeasance and the "like causes," 366, 367, 368, 629.
—— by the *wâkif*, only when he has reserved the right to do so, 363.
must observe the conditions in the *wakfnamah*, 419, 432, 618, 632, 635.
—— keep clear distinct accounts, 374.
—— ascertain the practice of his predecessor in office, when the directions of the *wâkif* cannot be ascertained, 374, 376, 377.
cannot resign the office without the permission of the Kâzi, 357, 621.
may assign his office or appoint another (*kaim mokâm*) or a deputy when his powers are general, 357—362, 632.
liable for loss sustained through his wilful neglect, 367.
liable personally for debts contracted for the *wakf*, unless they are authorised or for necessaries, 253—275, 625, 634.
may increase or decrease the allowance or salaries, 363, 372.
—— pay salaries which are due to the heirs of a deceased imâm and others, 371.
—— pay the allowance of a student who has been absent, when, 361, 371.
—— pay himself out of the income of the *wakf* property, advances made for the protection of its interests, 374.
the salary of, how fixed, 372.

MUTWALLI—(*Concluded.*)
the *wâkif*, when —, may take the allowance reserved for the trustee (Shiah Law), 413.
may employ the income of the *wakf*, for what purposes, 371, *et seq.*
—— not contract debts for the *wakf* unless authorised or for necessaries or with the sanction of the Kâzi, 373, 374, 375.
—— mortgage *wakf* property with the sanction of the Kâzi, 373, 386.
—— erect buildings on the *wakf* lands, 374, 380.
grant leases of *wakf* lands, for what period, 378 *et seq.*, *see* Lease.
—— reward the finder, if poor, of a treasure trove belonging to the *wakf*, 375.
can sell *wakf* property only when the power of sale is expressly reserved, 332, 336, 340 *et seq.*
may purchase property out of the *wakf* funds and may sell or exchange the same, 371.
liable for incumbrances on the *wakf* property, 630.
when may be take allowance, 626, 635.
effect of acknowledgment by, that another person is—instead of himself, 374, see *Sadakah*, and *Wakf*. *See* Appendix.

* * * * *

NAZIR—
the supervisor of a *wakf*, 370.
as supervisor may not spend any portion of *wakf* money, *ib.*
his duties as supervisor, *ib.*

NON COMPOS MENTIS—
four classes of persons according to Lord Coke, 42.
who may take possession of a gift on behalf of a person, 106.
capacity of a lunatic to make a will, 462, 463.
will of an idiot, 463.
an insane person may not be appointed an executor, 544.

ORPHAN—
who is an — so as to be entitled to a share in a *wakf* for the orphans of one's kindred, 331.

OUT OF POCKET—
the *mutwalli* may recoup himself for necessary expenses out of the income of the *wakf*, 374.
the executor may recoup himself for expenses incurred on behalf of the infant or the estate, 574.

PARENT—
the power of father to pledge the property of a minor, 506.
a father may sell his infant children's property, when, 569.

PARTITION—
cestui qui trust not entitled to, of trust property, 276.
by a Judge of the testator's estate, 565.
by an executor among heirs, 566.

PLEDGE
the power of a father or executor to pledge the property of a minor, 506, 569.

PERPETUITY—
implied by the mention of three generations in a *wakf*, 265, 267
usufructuary bequests may be made in perpetuity, 534, 585.
no rule against perpetuities under the Mahommedan Law, 534.
See *Wakf* and Bequest.

PERSONAL REPRESENTATIVE—
the executor is also the—of the testator, 549.
See Executor.

POSSESSION—
See Seisin.

POWERS—
of the executor, *see* Executor.
—— *mutwalli*, see *Mutwalli*.
—— *wâkif*, see *Wâkif* and *Wakf*.

PRE-EMPTION—
introduced into India by the Mahommedans, 589.
the Sunni Mahommedan Law of — in force in India either territorially or by custom, 592, 606.
definition of, 589.
its origin, *ib.*
applicable only to immovable property which has not descended by right of inheritance (Hanafi Law), *ib.*
—— (Shiah Law), 610.
does not apply to leases in perpetuity (Hanafi Law), 590.
right of — comes into operation upon the completion of the transfer of property for consideration (Hanafi Law), 589, 590.
—— comes into operation upon completion of the contract (Shiah Law), 607.
—— arises in what cases (Hanafi Law), 590, 591.
—— how evaded (Hanafi Law), 605.
—— (Shiah Law), 611.
—— may be expressly or impliedly relinquished or waived (Hanafi Law), 592, 603.
—— (Shiah Law), 608.
—— may be relinquished by guardian on behalf of a minor (Hanafi Law), 605.
—— relinquishment of, by guardian does not bind a minor (Shiah Law), 607.
—— once relinquished, cannot be asserted again (Hanafi Law), 592.
—— may be asserted, if relinquished upon wrong information (Hanafi Law), 603.
—— rendered void by operation of law (Hanafi Law), *ib.*
——may be claimed by three classes of persons (Hanafi Law), 592
—— by what persons (Shiah Law), 606, 607.
—— heritable (Shiah Law), 603, 610.

PRE EMPTION—(*Continued.*)
Hanafi Law : —
Right of — is in the owner of a servient tenement in respect of the dominant tenement, 593.
—— of joint owner of a part of a property is superior to that of one whose property is adjacent, *ib.*
—— in whom, when a building situate in a private lane contains several houses and one of these houses is owned by two persons, one of whom sells his share to an outsider, *ib.*
—— in whom in respect of a house owned by two persons and situate in a street which is not a thoroughfare, 593, 594.
—— of a person having a right of way superior to that of one having only a right of water, 594.
—— between neighbours, *ib.*
—— in whom, when relinquished or waived by a person having a preferential right, *ib.*
—— where several persons claim, and some of them are absent, *ib.*
—— extends to agricultural estates and is not merely confined to urban properties or small plots of land, 595.
—— a neighbour cannot claim, in respect of a share in villages or large estates, but a co-sharer can, *ib.*
—— held by the Calcutta Court not to exist where a Mahommedan co-owner sells his share to a Hindu, *ib.*
—— held otherwise by the Allahabad High Court, *ib.*
—— formalities requisite for the exercise of, *ib, et seq.*
Talab-i-Mowasibat or immediate demand must be made immediately on receipt of the news of the sale, 597.
—— after sale, *ib.*
—— may be made in any words which imply a claim, *ib.*
presence of witnesses unnecessary at the first *Talab*, *ib.*
"*Talab-i-ishtish hâd*" or "demand by invocation of witnesses" must be made either on the premises or property sold, or in the presence of the vendor or vendee, *ib.*
—— must be made within a reasonable time and without unreasonable delay after the first demand, 598.
—— how made, *ib.*
—— may be made by the claimant personally or through an agent, *ib.*
both *Talabs* or demands must be performed wherever customary, *ib.*
both *Talabs* may be performed at the same time, 599.
the pre-emptor must offer to pay the same price as the purchaser and to take the property on the same terms, 599, 600.

PRE-EMPTION—(*Concluded.*)
under Mahommedan Law there is no period of limitation within which the pre-emptor whose claim has not been acceded to, may prefer his claim (*Talab-i-tamlik*) in Court, 600.
Limitation Act provides a period of one year for it, *ib.*
pre-emptor must tender the price to the purchaser or deposit it in Court after decree within the time specified, 600.
when the right of pre emptor on a particular property is decreed in favour of two persons and one of them relinquishes his right after decree, 601.
purchaser entitled to retain the property until payment, *ib.*
the pre-emptor must pay for improvements to the purchaser, 601.
—— entitled to deduction in the price for deterioration in value caused by the purchaser, 602.
—— to resign his claim or to pay a proportionate price for the site where the purchaser has wilfully pulled down buildings or structures, *ib.*
—— must take the site at the full price where buildings are destroyed by inundation or fire, *ib.*
—— may avoid intermediate dealings by the purchaser, *ib.*
when purchased property to consist of several houses in a street in which there is no thoroughfare and the pre-emptor wishes to take one of them, the rights of the latter, 604.
when purchased property consists of several parts, each separate and distinct from the other, the rights of the pre emptor, *ib.*
Shiah Law—
Pre-emptor must pay the contract price to the purchaser, 607.
—— must take the whole property or abandon it, he cannot split up the contract in his favour, *ib.*
—— must prefer his claim as soon as he is informed of the contract, 608.
—— must prosecute his claim with due diligence, *ib.*
—— may prefer his claim personally or by agent, *ib.*
—— is not affected by the dealings of the purchaser with the property, *ib.*
—— rights of, when loss or damage is caused by act of the purchaser, 608, 609.
——, with respect to improvements, 609.

PRIVATE JUDGMENT—
consecrated by the Prophet, 23.
opinion of Shafei on, 22.
—— Malik on, *ib.*
—— Ibn Hanbal, on, 23.
—— Ibn Khaldún, on, 24.
—— early Hanafi jurists, on, *ib.*

PROCEDURE—
no special rules of, for establishing a *wakf* or right to a share therein under the Mahommedan Law, 440, 444.
every Mahommedan has the right to sue the *mutwalli* to establish a *wakf*, and his right to a share in its benefits under the Mahommedan Law, *ib. et seq.*
leave to sue the *mutwalli* of a *wakf*, 442 *et seq.*
leave to sue the *mutwalli* necessary when the trust is for a public charitable or religious purpose, 450.
leave to sue the *mutwalli* unnecessary in the case of a private trust, 451.
when may one or more *mutwalli* sue without joining the others in respect of the *wakf* estate, *ib.*
some of the *mutwalli* or *cestui qui trustent* may sue on behalf of the others with the leave of the Kázi, *ib.*
when some of several *mutwallis* are unwilling to join in suit to recover alleged trust property, 452, 454.
the *cestui qui trust* may sue the *mutwalli* for waste or misapplication of trust property, 452, 453, 454.
some of several *mutwallis* may maintain or defend a suit on behalf of the others, under the Mahommedan Law, 451 *et seq.*

PROPERTY—
disposition of, as between Mahommedans, governed by Mahommedan Law, 1, 2, 3.
disposition of, valid and effective, only when the owner divests himself in his lifetime of all property rights therein, 34.
whether ancestral or self-acquired, right of owner absolute during lifetime, 33.
no distiction between ancestral and self-acquired, under Mahommedan Law, *ib.*

PROPHET—
binding effect of the oral precepts of, 8.
the five traditions of the Prophet with commentaries. *See* App., 643, 645.

PURCHASER—
when purchaser of *wakf* property is entitled to remove erections or to compensation after the sale has been set aside, 387, 388.

RATIFICATION—
effect of—of the acts of one executor by his co executor, 557.

REGULATION—
Regulation XIX of 1810, 440, 442.

REVOCATION—
express withdrawal of power of—does not destroy it, 121, 125.

REVOCATION—(*Concluded.*)
of gift, abominable but valid(Hanafi Law), 119.
—— must be made in appropriate terms(Hanafi Law), 121.
—— may be made in what terms (Shâfei Law), 150.
—— effect of, 120.
—— under a Judge's decree, 120, 126.
—— by mutual consent, 120.
—— without a Judge's decree or mutual consent, 120, 123.
of gift as a general rule invalid (Shâfei and Mâliki Laws), 118.
—— invalid, under what circumstances under the Hanafi Law, 121, 122, 123
—— Shiah Law, 119, 143,
—— by parents to children, when invalid (Shâfei and Mâliki Laws), 118.
—— (Shiah Law), 143.
—— to a blood-relation within the prohibited degree, invalid (Hanafi Law), 119, 120, 122, 124.
——to relations, when invalid (Shiah Law), 143.
illustrations of revocable and irrevocable gifts, 121 *et seq.*
of gift of a debt to the debtor invalid (Hanafi Law), 123, 123.
—— affinity or fosterage, no bar to, (Hanafi Law), 123.
—— marriage, a bar to (Hanafi Law), 122.
of gift, acceptance of consideration, a bar to (Hanafi Law), 125.
contract to sell or pledge the subject of a gift does not amount to (Hanafi Law), 121.
an increase to the subject of a gift when a bar to (Hanafi Law), 122.
of gift of an undivided portion, valid (Hanafi Law), 126.
—— by way of *sadakah*, invalid (Hanafi Law), 124.
of conditional gift, when invalid (Shiah Law), 144.
after, the increase or accretion to a gift belongs to whom (Shiah Law), *ib.*
after, the liability of the donor with respect to the subject of gift, 123.
after, donee not liable for loss or injury (Shiah Law), 144.
when there is an express stipulation that there should be no consideration, in whom is the right of, (Shâfei Law), 150.
if the consideration is obligatory, the donor may revoke the gift upon non-payment (Shâfei Law), *ib.*
of wills and bequests—*See* Will and Bequest.

SADAKAH—
definition, 124, 171, 172, 648—650.
gifts by way of, seisin with respect to, 103, 124.
irrevocable after delivery of possession, 118, 124, 421.
difference between it and *Hiba*, 124.
examples of, 172 *et seq.*—*See Wakf.*

SAJJADANASHIN—
its meaning, 348.
who may be appointed, 348, 349.
an infant may not be appointed, as a general rule, 349.

SALE—
of the subject of a bequest, revocation under the Shafei and Mâliki Laws, 531, 585.
of *wakf* property, the Kâzi may direct a, 337, 341.
of *wakf* property, 383, 384.
of *wakf* property (Shiah Law), 421, 620.
of *wakf* property (Mâliki Law), 433, 434.
effect of a, by the executor, of the testator's property, 563, 573.
by an executor to himself of property belonging to a minor heir, 564, 565 *note.*
effect of, by father of infant's property, 564.
in death illness, valid to a third, 55.
of the subject of a gift after delivery of seisin void (Shiah Law), 143.
of the subject of a gift when something has been given in exchange for it, void (Shiah Law), 143.
of subject of a gift valid, if gift is illegal (Shiah Law), *ib.*

SEISIN—
what is, under Mahommedan Law, 94 *et seq.*
validates an imperfect gift, 71 75.
subject discussed by the Bombay High Court, 97.
how effected, 116, 120.
delivery of —, necessary to the validity of a gift, 94 *et seq.*
—— *wakf* (Shiah Law), 377.
—— (Mâliki Law), 405, 406.
its nature (Shiah Law), 377, 389.
when it should take place (Mâliki Law), 406.
delivery of, unnecessary when, 95, 96, 97, 114, 120.
——, power to take possession equivalent to, 90, 96.
—— unnecessary when there is on the part of a father or guardian a real and *bonâ fide* intention to make a gift to his minor son or ward, 95.
—— unnecessary when donee is already in possession of the subject of a gift, 102.
of the donee, must be with the permission of the donor (Hanafi Law), 96, 97.
——(Shiah Law), 170.
in the case of a gift by a husband to his wife, what is a sufficient delivery of —, 97.
——, gift would not be invalid if husband continued in possession of rents and profits after the date of gifts, if it could be inferred he was doing so as his wife's manager, 101.

SEISIN—(*Concluded.*)
continued possession unnecessary after compliance with the technical requirement of delivery of —, 101.
for the completion of a gift of immovable property by delivery and possession whether formal entry necessary, *ib.*
who entitled to, when a gift is made to a wife, infant, foundling, orphan or person *non compos mentis*, 104, 105, 106.
minor may take possession of a gift, when, 106.
delivery of seisin or possession in regard to the validity of a *wakf* (Hanafi Law), 194 *et seq.*
—— (Shiah Law), 395, 396.
Kabz-ul-kâmil or complete possession, 73.
Actual, apparently unnecessary to complete *hiba* of a *mushâa*, 75.

SETTLEMENT—
voluntary, in fraud of creditors or made by a person in insolvent circumstances, void, 48.
——, not void because made by a person in debt, 49 *note.*
——, principles appplicable to, 48.

SHIAHS—
sub-sections of, 10.
—— difference between them, *ib.*
text-books and authorities of, 26 *et seq.*

SHUYUU—
renders a gift invalid, not void (Hanafi Law), 86.
in order to invalidate a gift must be in existence at the time of the gift, must not be supervenient and must be such as is recognised by law, 87.
device to evade the operation of the principle of (Hanafi Law), 86.

SLAVE—
capacity of a, to make a will, 461, 579.
may be appointed trustee, 351
—— executor, when, 548.

STATUTES—
27 Eliz. Chap. IV, 51, 169.
21 Geo. III, Chap. 71, 2.

SUITS—
See Procedure.

SUKNA—
under a grant of, in general terms, the grantee cannot transfer his rights, 110, 111.
a grant of — to A and his children, 110.

SUNNIS—
divided into 4 schools, 13.
—— chief differences between them, 14.
doctrine of, based upon tradition, 8.

SUNNIS—(*Concluded.*)
their sources of Law, 9.
their principal text-books and authorities, 16 *et seq.*

SUPERVISOR OR *NAZIR*—
has no power to spend any portion of the *wakf* money, 370.

SURETY—
See Debt.

TAHLIL—
a device to give validity to a gift invalid on the ground of indefiniteness, 87.
examples of gift by —, 87 — 89.

TESTATOR—
capacity of, *see* Will.
must possess a disposing mind, 463.

TENANCY—
in common in *wakf*, 291.

TRADITIONS—
the five traditions of the Prophet with commentaries. *See* App., 643, 645.

TOWLIAT—
law relating to, *see* Trustee.

TRUSTEE—
wâkif or settlor may appoint himself *mutwalli* or trustee, 346, 419.
executor, when, 364.
appointment of, does not cease on the death of the *wâkif* when no time is mentioned as to its duration, 353.
—— contrary to the terms of the *wâkf* or the conditions laid down by the *wâkif*, is invalid, 363.
—— sanction of the Judge necessary for, when appointment, made by beneficiaries (Kâzi Khân), *ib.*
—— the right of, in whom, 346 *et seq.*
—— primarily, with the *wâkif*, 346 *et seq* 352.
who may appoint, when the *wâkif* has made no appointment, 347.
—— when the power of appointment is given to the children of the *wâkif*, some of whom are minors, 353.
—— in the absence of any provision in the trust-deed as to the mode of succession or of any evidence of usage, 347.

USULI—
doctrine of, 12.

WAKF—
its origin, 152.
definition of (Hanafi Law), 154, 628, 637, 641—646, 651.
——, by Abû Hanifa, 154.
——, by Abû Yusuf, 155.
——, by Abû Yusuf recognised as law, *ib.*
—— (Shiah Law), 390, 394.
—— (Maliki Law), 422.

WAKF—(*Continued.*)
three kinds of, 153, 218, 620.
legal effect (Hanafi Law), 620.
testamentary, revocable, 171, 299.
discretionary, lawful, 287.
the three legal effects of, (Mâliki Law), 433.
exceptions to, (Mâliki Law), 433.
summary of accepted principles regarding —, 260 *et seq.*
constitution of (Hanafi Law), 174, 621.
—— (Shiah Law), 390, 617.
—— (Mâliki Law), 431, *et seq.*
—— (Shâfei Law), 436.
to be valid need not be "solely to the worship of God," 265, 267.
no essential formality or express phrase or term requisite for, 174, 185, 390, 431, 624.
where a — is expressly created, the introduction of words of gift does not change its character, 391.
established by evidence, 394.
words and expressions by which it is completed, 175—185, 194, 390, 651.
the word —, not necessary, 178.
——, sufficient by itself, 180, 191, 621.
—— '*Sadakah*' necessary, 183.
Effect and meaning of the word *sadakah* combined with —, or its derivatives, 182.
legal effect, 185 *et seq.*, 260.
declaration extinguishes the right of the *wâkif* in the property and makes it irrevocably inalienable and non heritable, 185, 189, 194.
takes effect upon declaration just like the emancipation of a slave, 189.
conditions, relating to the settlor, 156, 157. *See* also Appendix, 620, *et seq.*
—— relating to the *wâkif* (Shiah Law), 400. *See* also Appendix, 617—620.
—— capacity of the *wâkif* (Mâliki Law), 424
—— a non-Moslem may make a — if he fulfils the necessary conditions (Mâliki Law), 429.
—— a non-Moslem cannot make a — for a mosque (Mâliki Law), 424.
Islâm not a necessary condition, 160.
by an apostate, 161.
the subject-matter of the — must be the property of the *wâkif* or settlor at the time of making it, 161, 399.
some consequences of this condition, 161.
qualifications of this condition, *ib.*
the entire subject-matter of the — need not be in the actual possession of the settlor at the time of the appropriation, 162.
property need not be entirely free from the right of others, *ib.*
—— that the *wâkif* is under no inhibition, 164, 620 *et seq.*
rights of creditors as regards *wakfs* by their debtors, 164 *et seq.*
that the *wâkif* is not *mariz*, or suffering from mortal illness, 169.

WAKF—(*Continued.*)
conditions relating to the subject matter of — (Hanafi Law), 186 *et seq.*, 194.
four conditions relating to the subject of a *wakf* (Shiah Law), 398, 617.
perpetuity (*abad*) or the intention to dedicate property permanently, express or implied, but its mention is not necessary at the time of dedication, 186 *et seq.*, 194., 622, 623, 628, 653.
this rule binding in India, 190.
dedication need not be for a continuing object or one that will not fail, 190, 194.
'*Wakf*,' '*Sadakah*' and equivalent terms imply perpetuity, 191, 194.
result of authorities, 192, 194.
perpetuity not necessary (Mâliki Law), 462.
mention of three generations or the use of a general term, as a rule equivalent to perpetuity, 265, 267.
——the subject of the — must not be uncertain, 200.
must not depend upon a contingency which may or may not occur, 201.
examples of a contingent —, *ib.*
must not depend upon a contingency Shiah Law), *note* 1, 375, 377.
invalid, when dependent on a contingency that may never happen (Shâfei Law), 436.
four conditions relating to the *cestui qui trust* (Shiah Law), 401.
four essential requisites for validity of, (Shiah Law), 407, 617 *et seq.*
two conditions necessary (Mâliki Law), 431.
delivery of possession or seisin unnecessary, 194 *et seq.*, 628, 638.
otherwise under Shiah Law, 395 *et seq.*, 409,
when seisin should be taken (Mâliki Law), 431, 432.
—— acceptance necessary for completion of, (Shâfei Law), 436.
—— the ultimate object must be one that cannot fail, 325, 623.
not subject to the right of private ownership (Shafei Law), 413.
invalid, without an object (Shâfei Law), 436.
the conditions in the *wakfnamah*, must be observed, 337, 338.
condition in a, that *mutwalli* must not let the — lands, not appoint his successor by will, valid, 335.
with reservation of the income and profits thereof to the *wâkif*, 332, 653 *et seq.*
—— power to exchange or sell, 332, 341 *et seq.*, 624, 636.
—— power once made it cannot be exercised again unless such intention is expressed, 332, 336.
—— power to exclude from or add to the number of the beneficiaries or alter their interest therein, 335, 336.

WAKF—(*Continued.*)
—— power to exclude any person from the benefit thereof (Shiah Law), 418.
wâkif may exclude what persons from the benefit of the, (Maliki Law), 424, 425.
the *wâkif* may declare the order under which the beneficiaries are to take, (Mâliki Law), 424.
a deed of trust with a provision excluding the operation of Mahommedan Law treated as a —, 344.
no condition in a, will deprive the Kâzi of his power of interference in the management of a —, 336, 635.
contradictory provisions in a *wakf-namah*, 343, 344.
with discretion to the trustees, 287.
upon one's self (Hanafi Law), 632, 644, 645.
how far the *wâkif* may reserve for himself any interest in the trust property (Shiah Law), 460 *et seq.*
with a condition that the *wâkif's* debts should be paid out of the income of the— (Shiah Law), 411.
with a condition that the property should return to the *wâkif* in case of necessity (Shiah Law), 418.
with an option on the part of the *wâkif*, 339.
created conditionally, 340.
conditions in a *wakf* must be observed (Shâfei Law), 340, 438.
the *wâkif* may reserve for himself the administration of the — (Hanafi Law), 629.
—— (Shâfei Law), 438.
rules relating to the application of *wakfs* in the absence of express provisions in the *wakfnamah* (Mâliki Law), 426 *et seq.*
with a provision that the right of representation should be admitted (Mâliki Law), 426.
—— that application should be *per capita* (Maliki Law), *ib.*
—— that division be according to sex (Maliki Law), *ib.*
men and women take equally when their shares are not fixed, *ib.*
a superior line excludes a lower line in the same branch (Mâliki Law), 427.
when one of the beneficiaries dies without issue, the share devolves upon whom (Maliki Law), 429.
by a person in death-illness, *see* Death-illness.
what may be the subject matter of a — (Hanafi Law), 202 *et seq.*, 622.
both movables and immovables (Hanafi and Shiah Laws), 207.
——(Shiah Law), 397, 617, 619.
what may or may not be the subject of a — (Shâfei Law), 435.
—— be the subject of a — (Maliki Law), 430, 431.
Government Securities, shares in Companies, debentures and other stock, may be subjects of a valid — 208.
everything that forms the subject of business transactions or which is customary in any particular locality to make — of, 208, 398.
immovable property may be the subject of a — (Mâliki Law), 431.
movable property lawful (Mâliki Law), *ib.*
—— of every kind except aliments or odoriferous plants lawful (Shâfei Law), 435.
dirhems and dinars (actual money) valid, 209, 398, 629.
of money (Shiah Law), 617.
a *dayn* or thing indeterminate or of profits, 398.
things capable of being weighed or measured, 208, 629.
of books, 209.
warm clothing for the poor, *ib.*
copper and other utensils, *ib.*
buildings without the land upon which it is erected, *ib.*
what is included in the — of a mansion, 210.
—— land, *ib.*
buildings and trees included in a — of land, *ib.*
—— but not the fruits on the trees nor a growing crop, *ib.*
right of water or way and mills included in a — of land, 211.
in a — of land or house the boundaries need not be specifically set forth, *ib.*
partible *mushâa*, *ib.*
of *mushâa* lawful (Hanafi Law), 629.
—— *mushâa* or an undivided share (Shiah Law), 400, 617.
—— lawful (Shâfei Law), 435.
a moiety of a *hammâm*, valid, 212.
in death-illness, *see* Death-illness.
property in the joint possession of two or more persons, 212.
land subject to a lease or mortgage, 210, 214.
iktaât (*jagirs*), may be subject of —, when, 214.
public lands by the Sultan for the public benefit, valid, *ib.*
in favour of his children invalid, *ib.*
from the *Bait-ul-mâl* for the public benefit valid, 214.
of a mansion for *ghâzis*, 243.
—— pilgrims, *ib.*
erections on — lands by the *mutwalli* or any other person, 374, 380, 387.
leases of — property, *see* Leases.
a fractional share of a particular property may be made (Maliki Law), 430.
future property may be the subject of (Maliki Law), *ib.*
Moukoof-Alaihim or for what persons and objects a — may be made, 216 *et seq.*
by a man on himself this children and vast (Hanafi Law) 638, 646.
on a person this children and after them to the poor (Hanafi Law), 647.

WAKF—(*Continued.*)
—— children (Hanafi Law) 626, 638, 640, 643.
—— children's children (Hanafi Law) 625, 626, 639.
—— descendants or posterity (Shiah Law) 619, 620.
—— (Hanafi Law) 620, 626, 633, 634, 636, 638, 639.
—— the poor (Hanafi Law) 632.
—— neighbours (Shiah Law), 619.
—— an apostate invalid (Hanafi Law), 623.
in favor of non-existing and existing objects (Hanafi Law), 634.
—— (Shiah Law), 618, 619.
—— a child *en ventre sa mère* (Shiah Law), 618.
—— (Maliki Law), 430, 431.
may be for the benefit of any person or class of persons, or for any object of piety or charity according to all the schools, 216.
for digging graves for the poor and providing shrouds valid, 389.
—— sinful purposes invalid (Shiah Law), 403.
—— an unlawful purpose invalid, (Shâfei Law), 435.
—— payment of the debts of the *wâkif* or for other purposes beneficial to him, 226, 398.
—— an indeterminate object, invalid (Shiah Law), 406, 618.
—— a good or charitable purpose generally (Shiah Law), 402, 404—6, 409.
—— a masjid (Shiah Law), 419, 618, 620.
—— which becomes ruined (Shiah Law), 404, 421, 619.
—— mosques and matters connected therewith, *see* Mosques.
—— a cemetery, *see* Cemetery.
—— aqueducts, wells, cisterns, *see* Cisterns.
of a road or way, *see* Way.
application of the income of a —, 322 *et seq.*
—— of immovable property, 325.
—— for madrasa or mosque, 326.
—— for students, 329.
—— of books, *ib.*
—— of a building, 328, 329.
when there are two *wakfs* for the same purpose, the income of one may be applied for the other, when, 314, 315.
for *maslâhat* that has ceased to exist how applied (Shiah Law), 404, 619.
—— masjid or reservoir, which is in ruins and not needed, may be spent on another masjid or reservoir, 321, 322.
on one's self, children, etc., *see Sadakah.*
when the Kâzi may order the sale of the — property, 328, 341.
—— may a — property be sold, 328, 329.
—— (Shiah Law), 421.
—— (Maliki Law), 433, 434

WAKF—(*Continued.*)
alienation of — property, *see* Alienation.
reversion to the nearest relatives of the foundors when the — fails (Shâfei Law), 436.
formally created by a person *sui juris* without any reason to suppose fraud or undue influence will not be set aside, 159, 623.
irrevocable when all conditions are complied with (Shiah Law), 396, 618.
cannot be altered when, once made (Mâliki Law), 432.
for 'the affluent first and then the indigent,' include, 218.
—— 'the affluent and indigent alike' include, *ib.*
—— the poor exclusively, *ib.*
in favour of the *wâkif* himself (Hanafi Law), 184.
—— (Shiah Law), 410 *et seq.*, 618.
—— first and then for other objects (Hanafi Law), 219 *et seq.*, 261.
—— (Shiah Law), 415, 618.
—— and his children and *nasl*, 225, 227 *et seq.*
difference of opinion as to the validity of the reservation in favour of the *wâkif*, 229, 230.
—— in favor of *wâkif's* posterity, valid according to all the schools, 225.
—— (Hanafi Law) 225, 227, *et seq.*, 264, 276, *et seq.*, 620, 25.
—— (Shiah Law) 418, 420, 618, *et seq.*
—— result of Arabic authorities, 236.
—— held invalid by the High Courts in India, *ib.*
—— rulings discussed, 236 *et seq.*
—— in favor of children and the poor, 268.
—— in favor of children and their children (Hanafi Law) 289, *et seq.*
—— (Shiah Law), 412.
—— (Shâfei Law), 437.
—— in favour of strangers, 234.
—— in favour of Sufis, 389.
in favour of heirs during death-illness, 276, 292 *et seq.*
on sons of A except those residing abroad, 295.
—— to the exclusion of daughters (Mâliki Law), 424, 425.
in favour of consanguine and uterine brothers, 295.
on wife and children, 269.
—— lineal descendants, 272.
—— one's own kindred or *akriba*, 280 *et seq.*
—— kindred residing in a particular place, 287, 296.
—— the orphans of one's kindred, 286.
—— who is an orphan, *ib.*
—— the nearest of his *karâbat*, 282.
—— relations generally (Shiah Law), 406.
—— one's poor kindred, 283.
—— (Hanafi Law), 301.

WAKF—(*Concluded.*)
—— the poor (Shiah Law), 402.
—— the poor, children may participate in the —, if they become poor, 296.
—— neighbours, 288.
—— (Shiah Law), 404, App. 619.
for *al* or *jins*, 297.
—— the people of one's *bait* or house, *ib.*
on *al*, *jins*, *akab*, *karabâtdar*, *zukarâbat*, *arkân* and *ansâb*, 280. 281.
for those who are *sâleh* (pious), 281.
—— persons described by a particular relationship (Shiah Law), 404.
—— a class of persons, 291.
—— some or all of them reject it, *ib.*
—— of whom only one is in existence, 281.
on students, may be made, 227.
for Shiahs (Shiah Law), 402.
—— *momins* generally (Shiah Law), *ib.*
—— Moslems generally (Shiah Law), 403. *See* App., 618.
—— *a harbi* or alien enemy invalid (Shiah Law), 402.
—— *masâlih*, valid (Shiah Law), 402, 404, 419.
—— an apostate invalid (Shâfei Law), 435.
—— a person for a fixed period or for life with an ultimate trust for the poor, valid (Shiah Law), 409.
in favour of non existing and existing objects (Shiah Law), 401. See App. 618.
—— (Hanafi Law), 323 *et seq.*
—— (Maliki Law), 424.
—— children lawful, 265 *et seq.*
—— a child *en ventre sa mère*, invalid (Shâfei Law), 435.
—— (Shiah Law), 618.
for persons between whom and the *wâkif* there are ties of patronage (Shafei Law), 437.
—— two persons and the poor (Shâfei Law), *ib.*
—— a person incapable of taking possession invalid (Shâfei Law), 436.
in death-illness, *see* Death-illness.

WAKIF—
evidence admissible to explain the settlor's meaning, when there is any ambiguity, 338, 394.
—— inadmissible to alter or modify the intention of the — when his language is clear, *ib.*
where words are capable of two constructions, the one most consistent with the settlor's intention must be adopted, *ib.*
the intention of the — must be scrupulously regarded in carrying out the trust, 337, 338.
the powers of the —, 331 *et seq.*
the — may reserve the management of the *wakf* for himself during life, 331.

WAKIF—(*Concluded.*)
—— the power of exchange or of sale, 332, 340, *et seq.*
such power once exercised cannot be exercised a second time, unless such intention clear, 332, 336.
the — may reserve the right to give the produce to whomsoever he pleases, 333, 376.
—— at time of dedication the power to add to or exclude from the number of beneficiaries or alter their interest in the *wakf*, 335, 336.
—— provide for the payment of his debts, 343.
—— the right to remove the *mutwalli* of a *wakf*, 355.
cannot deprive the Kâzi of his powers of interference in the management of the *wakf*, 336.

WAKFNAMAH—
wakfnamah in *Doe dem. Jaun Bebee* v. *Abdollah Barber*. See App., 657.

WASIAT—
See Bequests.

WAY—
dedication of a road or — how made, 316.
leading to a mosque may be repaired with the funds of the mosque, when it becomes dilapidated, 322.

WELLS—
See Cisterns.

WILL—
definition of, 459, 460, 527.
lawful under Mahommedan Law, 457.
nuncupative wills valid under Mahommedan Law, 459, 542.
probate Act of 1881 applicable to wills of Mahommedans, 543.
constitution of, 459, 460, 461, 582.
may be made verbally or in writing, 459, 542.
may be made by signs, 460.
may be conditional or contingent, 461.
distinction between a contingent — in writing and one made verbally, *ib.*
distinction between disposition by — and that *inter vivos*, 395, 460.
who may make a, 461 *et seq.*
—— (Shâfei Law), 579.
difference of religion between testator and legatee no incapacity, 473.
capacity of a slave to make a, 461, 579.
—— of an insane person, 462, 463.
bequest by an insane person or a *Mokâtib* or a *mazoon* is void, 462.
a disposing mind, what is meant by, 463.
capacity of a person suffering from death-illness (Hanafi Law), *ib.*
capacity of a person in death-illness (Shiah Law), 465.
—— (Shâfei Law), 583.

WILL—(*Continued.*)
effect of testamentary disposition by a person in death-illness, 466, *et seq.*, 583.
distinction between a gratuitous disposition on death-bed and the acknowledgment of a liability, 467.
capacity of an infant (Shiah Law), 470.
—— (Hanafi Law), 471, *et seq.*
—— (Malikis and Shafei Laws), 470.
—— of infants, difference between the Hanafi and Shâfei Laws, 471.
—— of a person condemned to death for an offence, 473.
—— of a Moslem who subsequently becomes an apostate, *ib.*
by a Moslem in favour of an alien infidel, unlawful, 481.
of an insolvent person, 474.
—— (Shiah Law), *ib.*
of a non-Moslem subject, 512 *et seq.*
by *Zimmi* for secular purposes, valid according to all the schools, 512.
—— *Zimmi*, for four kinds of purposes which are not secular, 512, 514.
—— *Zimmi* residing in Mussulman territory, in favour of a hostile infidel, invalid, 516.
—— Mussulman or *Zimmi* in favour of a *mustâmin*, resident in Mahommedan territory valid, 513, 515.
may be made for any lawful purpose, 475, 579, 580, 585.
a person may will away his entire property when there are no heirs, 480.
in favour of an alien infidel according to all the schools, 481.

WILL—(*Concluded.*)
Revocation of, may be made at any time, 529.
—— may be expressed or implied, *ib.*
—— four modes of, (Hanafi and Shiah Laws), 529 *et seq.*
—— (Shâfei Law), 586.

WOMEN—
May be appointed executor, 544, 587.
—— appointed trustee, 347.
When appointed trustee, may appoint a substitute, 250.
May not be appointed trustee when the trustee has to perform religious duties in connection with the *wakf*, 348.
Cannot be appointed *sajjâda-nashîn*, 348.
Capacity of — to make wills, *wakfs* and gifts, *see* Will, *Wakf* and Gift.

ZIMMI—
Will of a, 512 *et seq.*
The secular purposes for which he may lawfully make a will, 512, 516.
The four purposes which are not secular, 514.
Cannot bequeath more than a third of his estate to a stranger or heir, 513, 516.
May will in favour of an infidel of a different persuasion, 514, 516.
While resident in Mahommedan territory, may not will in favour of an hostile infidel, 516.
May make a will in favour of a *mustâmin* resident in Mahommedan territory, 513, 515.

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